Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TRACY THORNE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE;
WILLIAM S. COHEN, SECRETARY OF DEFENSE;
UNITED STATES DEPARTMENT OF THE NAVY; AND
JOHN H. DALTON, SECRETARY OF THE NAVY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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135 pp

QUESTIONS PRESENTED

1. Does the federal government's "Don't Ask, Don't Tell" policy on military service by homosexuals, which subjects gay servicemembers to discharge if they ever tell anyone that they are gay or engage in other non-verbal communicative acts, violate the First Amendment's guarantee of freedom of speech and association?

2. Does the federal government's "Don't Ask, Don't Tell" policy on military service by homosexuals, which punishes gay servicemembers who reveal their sexual orientation or engage in other non-verbal communicative acts for presumptively engaging in acts that are permitted to heterosexuals, violate the constitutional guarantee of equal protection of the laws?

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PETITION FOR WRIT OF CERTIORARI

Tracy Thorne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, issued *per curiam*, is not reported (App. 1a). The first opinion of the United States District Court for the Eastern District of Virginia (App. 16a) is reported at 916 F. Supp. 1358. The second opinion of the United States District Court for the Eastern District of Virginia (App. 3a) is reported at 945 F. Supp. 924. The findings of the Board of Inquiry (App. 44a) and the separation order (App. 45a) are not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 9, 1998. App. 1a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the following are provided in the Appendix: the First Amendment to the United States Constitution (App. 47a); the Fifth Amendment to the United States Constitution (App. 47a); Section 571 of the National Defense Authorization Act of 1994 (10 U.S.C. § 654) (App. 48a); and Department of Defense Directive No. 1332.30 (App. 53a).

STATEMENT OF THE CASE

This case challenges the constitutionality -- on its face and as applied -- of the statute and implementing regulations known as "Don't Ask, Don't Tell." Petitioner, a top-gun Naval Flight Officer in the United State Navy, was dismissed solely because he stated that he is gay. The policy offends the most basic notions of liberty and fairness in the Constitution.

The "Don't Ask, Don't Tell" Policy

Congress enacted the "Don't Ask, Don't Tell" policy on November 30, 1993 as part of the National Defense Authorization Act of 1994 ("the Act"). 10 U.S.C. § 654 (App. 48a). The Act purports to embody the finding that a servicemember's homosexual orientation is not incompatible with military service. *Id.* § 654(a)-(b) (App. 48a-51a). Nevertheless, the Act subjects a servicemember who states that he or she is homosexual to a full Board of Inquiry proceeding to determine whether that servicemember is a "person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* § 654(b)(2) (App. 51a) While the Act provides no

definitions for the terms "propensity" or "intends," it defines "homosexual act" as

> (a) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and
>
> (b) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (b).

Id. § 654(f)(3) (App. 52a). Thus, according to the Act, innocuous activities such as hand-holding or kissing a member of the same gender may constitute a dischargeable "homosexual act."

The Department of Defense ("DoD") issued directives implementing the Act in December 1993. *See* DoD Dir. 1332.30 (App. 53a).[1] At first glance, the directives embody the purported policy of the Act by providing that "homosexual orientation is not a bar to continued service unless manifested by homosexual conduct." *Id.* at Enc. 2, ¶ C (App. 60a). Like the Act, however, the directives eschew this policy by including the statement "I am gay" as actionable homosexual conduct. Under the directives, that statement of identification -- even if made off-base, to a civilian, or, as in this case, in the midst of a national dialogue on the issue of civil rights -- subjects the servicemember to a full Board of Inquiry proceeding during which the

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[1] DoD Directive 1332.30, pursuant to which Lt. Thorne was separated, applies to regular commissioned officers. DoD Directive 1332.14, which applies to enlisted personnel, is identical in all material respects to DoD Directive 1332.30.

servicemember must present evidence demonstrating that he or she is not a person who "engages in homosexual acts or has a propensity or intent to do so." *Id.* at Enc. 2., ¶ C.1.b. (App. 60a). Moreover, like the Act, the directives proscribe any communicative act that is not a statement, but that a "reasonable" person would conclude "demonstrates a propensity or intent" to engage in homosexual acts. There is no proscription in the policy for similar acts -- such as hand-holding or putting an arm around a friend -- by heterosexuals.

PETITIONER'S NAVAL CAREER AND PREMATURE SEPARATION

Throughout his naval career, Lt. Thorne repeatedly demonstrated that he possesses, to an extraordinary degree, the qualities of leadership, discipline, competence, integrity, and courage that the Navy seeks in its junior officers. Lt. Thorne's superlative abilities were consistently recognized during his five years of active duty service. *See generally* COA App. 169-172.

As the District Court recognized:

> By all accounts, had Lieutenant Thorne not publicly announced that he was a homosexual, he would be an exemplary Naval Officer. In May of 1989, Thorne began his military career by entering Aviation Officer Candidate School. He quickly excelled, receiving Outstanding Achievement Awards for his academic excellence and his physical training. He was first in his class in each of the basic, intermediate, and advanced portions of his training, was placed on the Commodore's

> List for academic and flight achievement, and was named top student flight officer.
>
> After completing his tenure at AOCS and earning the designation of Naval Flight Officer, Thorne spent thirteen months training as a bombardier/navigator in the A-6 Intruder. He then joined Attack Squadron VA-65 at the Naval Air Station in Oceana, Virginia, where he continued to excel, impressing his commanding officers with his leadership and aviation skills.

Thorne v. United States Dep't of Defense, 916 F. Supp. 1358, 1361 (E.D. Va. 1996) (App. 18a).

In the spring of 1992, various candidates for President campaigned on their positions to extend or to end the ban on gays serving in the military. *See e.g., The Issue: Barring Gays from the Military*, The Associated Press, Mar. 16, 1992, *available in* 1992 WL 5289570. In May of that year, and only months before the Presidential election, Lt. Thorne appeared on the ABC news program *Nightline* with Rep. Pat Schroder. *Nightline* was featuring a discussion on legislation which had been introduced by Rep. Schroder that same day to end the ban then in existence on military service by gays and lesbians. During the broadcast, Lt. Thorne joined Rep. Schroder in urging the public to advocate an end to the ban and to elect candidates who would support an end to the ban. *Nightline*, ABC News, May 19, 1992, *available in* LEXIS, News Library, ARCNWS file. Lt. Thorne believed that public disclosure of his orientation as a successful, well-adjusted, and respected military officer was critical to advancing the legislative efforts to end the ban. During the program, Lt. Thorne publicly disclosed his homosexual orientation. Before

doing so, he advised his squadron Commanding Officer of his intention to appear on the program and to participate in this national debate, stating, "I take these steps in the hope that I might make the Navy a better and more tolerant institution." COA App. 391.

Within days of his appearance on *Nightline*, Lt. Thorne received notification of discharge proceedings brought by the Navy against him for his statements acknowledging his homosexuality. These discharge proceedings were widely publicized in the national media. *E.g.*, Arthur P. Brill, Jr., *The Grounding of Lt. Thorne*, Wash. Post, June 2, 1992, at A19. In May 1993, after a Board of Inquiry recommended his discharge based on his acknowledgement of homosexuality, the Navy placed Lt. Thorne on inactive standby reserve. COA App. 164. On January 23, 1994, the Navy issued Official Recall Orders pursuant to a stipulation by Lt. Thorne and Defendants before the United States District Court for the District of Columbia on January 7, 1994. COA App. 163.

On January 31, 1994, Lt. Thorne reported for duty to the Commander, Naval Air Systems Command ("NAVAIRSYSCOM"). Upon his return to active duty, Lt. Thorne provided letters to the Commander, NAVAIRSYSCOM, and Cdr. Luigart, his commanding officer, assuring them that his previous declaration of homosexuality would in no way impede his duties. COA App. 168.

Once again, the Navy began proceedings before a Board of Inquiry, this time under the new "Don't Ask, Don't Tell" law. At the hearing, the Navy presented no evidence to the Board of any homosexual acts or other forbidden conduct on the part of Lt. Thorne, instead proceeding against Lt. Thorne on the basis of his

statements that he is gay, a life insurance policy, and Lt. Thorne's association with a "known" homosexual.

At the conclusion of the hearing, by a unanimous vote, the Board of Inquiry found that the statements made by Lt. Thorne raised the presumption of homosexual conduct -- a propensity or intent to engage in homosexual acts -- as set forth in the regulations. Further, the Board found that Lt. Thorne made no attempt to rebut the presumption. Accordingly, the Board recommended that Lt. Thorne be separated with an honorable discharge.

While a review of this recommendation was pending, Cdr. Luigart submitted a fitness report on Lt. Thorne to the Commander, NAVAIRSYSCOM, in which he noted that Lt. Thorne was "[t]he most dynamic and ingenious Lieutenant I have had the pleasure to command." COA App 170. Subsequently, the highest echelons of the Navy officially recognized that, as an openly homosexual naval officer, Lt. Thorne performed effectively and that his presence had no deleterious effect on unit cohesion and morale. On January 24, 1995, after the second Board of Inquiry recommended discharge because Lt. Thorne said he is gay, the Secretary of the Navy awarded the Navy Achievement Medal to Lt. Thorne for professional achievement from January 1994 to October 1994. The accompanying Citation stated: "Lieutenant Thorne's superb leadership, exceptional professionalism, and total devotion to duty reflected credit upon himself and upheld the highest traditions of the United States Naval Service." COA App. 171.

Despite the military's praises and awards, the Secretary of the Navy for Manpower and Personnel discharged Lt. Thorne from the United States Naval

Reserve for reasons of "homosexual admission" on March 6, 1995. App. 45a.

The Courts Below

The United States District Court for the Eastern District of Virginia issued a Memorandum Opinion on March 4, 1996, stating that the record before it prevented an adequate consideration of the constitutionality of "Don't Ask, Don't Tell." App. 16a. The court directed the parties to supplement the record as to the rebuttability of the policy's presumption of homosexual conduct following a servicemember's declaration of homosexuality. App. 43a. While the parties were briefing that issue, the United Stated Court of Appeals for the Fourth Circuit issued a decision *en banc* upholding the constitutionality of the "Don't Ask, Don't Tell" policy. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 358 (1996).

The District Court issued a second decision on November 20, 1996. App. 3a. In that decision, the court rejected petitioner's argument that *Thomasson* did not dispose of the issue presented by the court, App. 10a, and further found that the presumption in the policy was rebuttable, App. 14a. The court accordingly found that the policy did not violate the First Amendment. The court did not address petitioner's equal protection argument.

In a *per curiam* decision dated April 9, 1998, the United States Court of Appeals for the Fourth Circuit affirmed the District Court decision. App. 1a.

REASONS FOR GRANTING THE PETITION

This case presents issues of exceptional constitutional importance. At issue is not only whether Congress is constitutionally permitted to suppress a statement of identification by a military servicemember, but also whether Congress may constitutionally base such a restriction of self-identification on the assumption that the message may offend the sensibilities of other military officers. Moreover, this case challenges the notion that Congress may constitutionally restrict the speech of honest homosexuals without restricting similar speech by other servicemembers. The overbreadth of the restriction is without parallel: the restriction on a servicemember's ability to tell someone he or she is gay applies even to statements made off-base, while on leave, to civilians or family members. This restriction exists despite the express findings in the Act that homosexuality is not incompatible with military service.

The issues presented by this Petition arise in a most sensitive context. Not presented by the Petition is any challenge to the military's prerogative to discharge military officers for engaging in any conduct that is proscribed for all servicemembers under the Military Code or, indeed, threatening to do so. Indeed, the only justifications offered to support "Don't Ask, Don't Tell" is as a means of implementing a prohibition on homosexual acts that in itself erects an unjustifiable distinction in treatment between gay and heterosexual servicemembers violative of the Fifth Amendment's guarantee of equal protection of the laws. Yet the challenged policy chooses as a means of implementing that objective a tack that appears on its face to be designed to inflict maximum damage to First

Amendment and equal protection rights and the values those rights reflect.

The military disclaims any interest in barring officers from the military because they have a homosexual orientation. Moreover, no one disputes that allowing homosexuals to speak out, to address the perceived forms of discrimination against them, and to make reference to their own sexual orientation in doing so -- just as Lt. Thorne did here to dramatize the unfairness and inequity that arises from the stereotypes and misconceptions that are used to justify such discrimination -- represent forms of political speech at the core of our First Amendment values and our equal protection rights to engage in the political process.

The "Don't Ask, Don't Tell" policy nonetheless purports to authorize discharge -- and effectively compels discharge of a large number of people -- because of one's public speech, attesting to one's homosexual orientation. Thus, the exercise of one's free speech rights, confirming a fact that the military would not regard as a cause of discharge, nonetheless becomes the basis for discharge. The fact of one's homosexual orientation is not sufficient for discharge, nor does it trigger an inquiry. It is the person's willingness to speak honestly about this subject that provides the decisive criterion for discharge. That the policy is structured this way is a restriction on speech because the speaking of the words alone gives rise to the liability. And it is restriction on speech and a citizen's right to engage in the political process that present a direct assault on core constitutional values. The speech in question is of unquestioned political importance. But so too is it of unquestioned personal importance, striking at the core of a person's being and privacy.

The courts below found that there was really no restriction at issue on speech because the presumption created by the public attestation of one's homosexual orientation is rebuttable. But that view fails to give proper weight to the fact that it is only speech on the subject that gives rise to the inquiry. A restriction imposed only by virtue of speaking out is a restriction on speech. Under the policy, a homosexual orientation itself is simply not a basis for triggering any inquiry; a statement of that orientation, however, is and places a dramatic burden on the speaker to rebut the inferences that the policy itself requires a factfinder to draw from it. By affording such vast weight to the speech itself, the policy affords no reasonable respect for the rights and interests of servicemembers.

Moreover, even if the government were able to base the policy on a demonstration that a willingness to speak out to attest to one's homosexual orientation might have some logical connection to the possibility of future homosexual acts as defined by the policy (and not acts proscribed for all servicemembers by the Military Code), that presumption would fail because the acts proscribed by the policy are not proscribed for all servicemembers, but only for gay and lesbian servicemembers. The Constitution demands that if the military is to ban activities such as kissing and hand-holding for one class of people, it must ban those activities for all of its servicemembers.

Finally, the courts below entirely ignored Petitioner's equal protection argument that the policy irrationally used historic stereotypes to discriminate against gays and lesbians *and* crushed the ability of gays and lesbians to urge the public to support an end to the ban.

Despite clear precedent from this Court to the contrary, the lower courts have ruled that Congress does not offend the Constitution when it prohibits a servicemember from *ever* saying -- without the stigma and trauma of a full Board of Inquiry proceeding -- the honest words "I am gay." These courts have similarly ruled that Congress may constitutionally allow non-verbal expressions of homosexuals to be the basis of a servicemember's discharge, without applying the same standard to heterosexuals. Moreover, those courts have allowed invidious and irrational prejudice to be the basis on which the policy is advanced. The Constitution's guarantees of equal protection and freedom of speech and association demand that the "Don't Ask, Don't Tell" statute and directives be struck down.

I. This Case Presents Questions of Exceptional Constitutional Importance That Have Been Wrongly Decided By the Courts Below

A. The "Don't Ask, Don't Tell" Policy Violates Lt. Thorne's Core First Amendment Rights To Freedom Of Speech And Association.

1. Participation in the political process is at the heart of First Amendment protections of speech and association. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-71 (1964). As such, political speech has always received the highest level of constitutional protection from this Court. *New York Times*, 376 U.S. at 270 (finding that the First Amendment protection of speech arises from a "profound national commitment" to uninhibited debate on public issues). Freedom of association is inexorably

linked to effective advocacy on important political issues, hence government restrictions on association are also reviewed with the strictest constitutional scrutiny. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Simply put, Lt. Thorne was discharged for participating in the national debate regarding the status of homosexuals in the military. At the height of this debate and on a nationally respected news program -- ABC's *Nightline* -- he "came out of the closet." In that highly charged political environment, his statement of identity was a clear and profound political statement and an act of expressive association. *Roberts*, 468 U.S. at 622 (finding that "according protection to collective effort on behalf of shared goals" is important to preventing suppression of minority opinions). His statements and actions, as a gay man, were at the core of his ability to add his voice to the political process. *Clairborne Hardware Co.*, 458 U.S. at 933 ("One of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.").[2]

As written, and as applied to Lt. Thorne, the policy punishes speech. The DoD Directives implementing the

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[2] Lt. Thorne's interest in the national policy on the status of homosexuals in the military was particularly acute. The military's ban on homosexuals forced him to live a lie, keeping an essential element of his identity secret from friends, family and colleagues. Ironically, while purporting to allow homosexuals to serve, the new policy requires gay servicemembers to lie to those around them about who they are.

policy state that "homosexual orientation is not a bar to continued service . . . ." DoD Dir. No. 1332.30, Enc. 2, ¶ C (App. 60a). The Navy's own conduct in implementing "Don't Ask, Don't Tell" must doom the policy. In discharging Lt. Thorne, the Navy offered evidence only as to actions that are central to the First Amendment's protections against restriction of speech and association.

While the government has claimed since its formulation that the policy is aimed at conduct, such semantics cannot save the policy from the reality that, in First Amendment terms, its restrictions on speech are more than incidental; they are content-related and aimed at protecting the sensibilities of those who might hear the message. It is the content of the statements and not the actions of an individual that is the focus of the Directive's prohibition. The message communicated -- that an officer is gay -- is objectionable to the military. A law is content-based if it distinguishes "favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994). Had Lt. Thorne declared that he was a heterosexual or stayed silent about his homosexuality, the Navy would not have proceeded with a Board of Inquiry against him.

Moreover, the "Don't Ask, Don't Tell" policy restricts speech based on the viewpoint expressed by the speaker. The First Amendment prohibits viewpoint-based restrictions on speech even where the government would otherwise be permitted to regulate the entire category of speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (finding regulation of only the "hate speech" subset of fighting words to be unconstitutional viewpoint discrimination). This Court has made clear

that statements of self-identification about sexual orientation express a specific viewpoint. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 570 (1995); *see also Elzie v. Aspin*, 897 F. Supp. 1, 5 (D.D.C. 1995) (finding that the *Hurley* Court recognized that the statement "I am homosexual" expressed a viewpoint). Accordingly, even if the military could constitutionally proscribe all discussion of sexual orientation, it cannot prohibit only declarations of homosexual orientation. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that the state cannot engage in viewpoint discrimination, even when it has the right to exclude some content).

2. Both content- and viewpoint-based restrictions on speech are "presumptively invalid" under the First Amendment. *R.A.V.*, 505 U.S. at 382. In *Police Dep't of Chicago v. Mosely*, this Court declared, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." 408 U.S. 92, 95 (1972). This Court applies the strictest level of scrutiny to such regulations, requiring the government to bear the burden of proving that the "regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).[3]

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[3] Content- and viewpoint-based restrictions are unconstitutional regardless of whether they actually prohibit speech or merely impose additional burdens on speech. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 109 (1991) (invalidating a law that prevented criminals from profiting from books and other works describing their crimes by requiring payment of proceeds to a

(continued...)

While this Court has recognized that the special role of the military in our society allows some restrictions of servicemembers' First Amendment rights, those restrictions must "protect a substantial government interest *unrelated to the suppression of free expression.*" *Brown v. Glines*, 444 U.S. 348, 354 (1980) (emphasis added); *see also, Greer v. Spock*, 424 U.S. 828, 838-39 (1976) (upholding a restriction on civilian speech on military bases after finding "no claim that the military authorities discriminated in any way" based on the speaker's views and that the regulation was not aimed at the suppression of free expression). This Court does not defer to government acts that restrict speech because of the viewpoint expressed. *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993). The same standard should apply to military policies. Accordingly, the Department of Defense must meet the highest standard of review for this viewpoint- and content-based restriction on speech.

3. The restrictions on communication in the "Don't Ask, Don't Tell" policy are not based on any compelling or even rational government interest. That the policy allows gays and lesbians to serve, albeit in the closet, is conclusive proof that there is no concern about the fitness of gays and lesbians to serve. Rather, the policy is based on the fears and prejudices of

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(continued. . .)

crime victims board). Unconstitutional chilling effects on speech can take many forms. *See, e.g., Simon & Schuster*, 502 U.S. 105 (financial consequences); *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) (same); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (employment consequences); *R.A.V*, 505 U.S. 377 (1992) (criminal sanctions).

heterosexual servicemembers, masquerading under the terms "unit cohesion," "discipline," "good order," and "morale." 10 U.S.C. § 654(a)(15) (App. 50a).

Prejudice, fear, disapproval, or discomfort of the listener have never been a legitimate reason for stifling speech. Heterosexual prejudice is no different and is not a valid justification for regulating the speech of servicemembers. In *Texas v. Johnson*, for example, this Court held that the government may not punish speech simply because the audience "takes serious offense [to a] particular expression." 491 U.S. 397, 408 (1989). *See also United States v. Eichman*, 496 U.S. 310, 318 (1990) (finding that government's interest in suppressing speech does not become more "weighty as popular opposition to that speech grows"); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."). Similarly, the First Amendment forbids the government from silencing speech based on the anticipation of a hostile audience reaction. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Even assuming, *arguendo*, that the unit cohesion rationale has some grounding in reality, the policy is not narrowly tailored to achieve those objectives. It targets those who say they are gay, but never engage in the prohibited conduct. Thus, gays and lesbians (such as Lt. Thorne) who are expressly permitted to serve under the policy can be subjected to the stigma and trauma of a Board of Inquiry proceeding absent any proof of prohibited conduct.

4. The fact that the policy creates a rebuttable presumption of acts -- themselves discriminately prohibited -- rather than an outright ban on the speech does not redeem its constitutionality. The First

Amendment does not protect only against direct punishment of speech; it also guards against less absolute restrictions that might have a chilling effect on speech. *See, e.g., Nationalist Movement*, 505 U.S. 123 (holding that a variable fee requirement for demonstrations created an unreasonable burden on speech). This is particularly true in situations in which a presumption of misconduct arises from a person's status, as it does under the "Don't Ask, Don't Tell" policy. *See Robinson v. California*, 370 U.S 660, 666 (1962).

First Amendment overbreadth challenges do not require that there be no constitutional application of the law. *See Nationalist Movement*, 505 U.S. at 129 ("an overbroad regulation may be subject to facial review and invalidation even though its application in the case under consideration may be constitutionally unobjectionable"). Indeed, the very purpose of an overbreadth challenge is to allow a petitioner to whom the law has been applied in a constitutional manner to mount a facial challenge to the law on the theory that its unconstitutional application in another case might have a chilling effect on protected speech. *Id.* ("[The overbreadth doctrine] is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.").

This Court's recent holding in *Reno v. ACLU*, ___U.S. __, 117 S. Ct. 2329 (1997), further clarifies the appropriate standard of review for facial challenges to laws containing affirmative defenses. In *Reno*, the Court held that including an affirmative defense to a restriction on speech is insufficient to overcome a facial challenge to a content-based restriction if the law has a chilling effect on speech. *Id.* at__, 117 S. Ct. at 2349.

The Court invalidated the "indecent speech" portion of the Communications Decency Act which, like the "Don't Ask, Don't Tell" policy, purported to allow affirmative defenses to an otherwise blanket content-based prohibition on speech. Despite the fact that some internet providers of indecent materials may have been able to employ the affirmative defense with success, the Court held the defenses "illusory." *Id.*

The possibility of rebutting the presumption created by a declaration of lesbian or gay identity is even more problematic. The possibility of being called to appear before a Board of Inquiry and being forced to discuss the most intimate and private details of sexual activities and desires are, in and of themselves, sufficiently traumatic and stigmatizing to have a chilling effect on speech. In addition, because the policy specifically recognizes that a homosexual orientation is not a bar to successful military service, the revelation of that orientation should create no additional bar. It is thus speech that is punished.

B. Petitioner's Right to the Equal Protection of the Laws Has Been Violated.

The "Don't Ask, Don't Tell" policy treats gay and lesbian servicemembers differently than it treats heterosexual servicemembers. Gay and lesbian servicemembers who disclose their sexual orientation or engage in non-sexual expressive communication are implicated by the policy, while heterosexual servicemembers who do the same are not. This classification is offensive to the Constitution and demands strict scrutiny.

1. This Court has long recognized the fundamental right to participate fully in the political process. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (implying that heightened scrutiny should be applied to equal protection challenges to legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"). The government may not extinguish the voice of any minority group or make "it more difficult [for that group] to enact legislation on its behalf." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 468 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 393 (1969)); *accord Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-28 (1969); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).[4] A classification infringing on a fundamental right invokes strict scrutiny review under the constitutional guarantee of equal protection. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).[5]

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[4] Numerous other decisions of this Court have recognized the fundamental right of minorities to have an opportunity "to influence the political process." *Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986); *accord Board of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 693 (1989); *cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) (using similar language but deciding the case on a basis other than fundamental rights).

[5] This Court could also hold that this legislation unconstitutionally invokes a suspect classification entitled to heightened scrutiny. It is clear that homosexuals have experienced a history of discrimination that is unrelated to their abilities, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality), and are members of a discreet and insular class, *see Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). Moreover, various scientific studies conducted within the last ten years have revealed that sexual orientation has a biological basis. Thus, under established precedent, classifications based

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While courts normally provide deference to a statute enacted by a legislative body, *see, e.g., Vance v. Bradley*, 440 U.S. 93, 97 (1979), this deference assumes an open democratic process. When legislation "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities," heightened scrutiny is required because the process alone can no longer prevent arbitrary discrimination by the majority. *Carolene Products Co.*, 304 U.S. at 152-53 n. 4. Therefore, "[a]ny unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government" and must be "carefully and meticulously scrutinized." *Kramer v. Union Sch. Dist.*, 395 U.S. at 626-28; *Crawford v. Board of Educ of Los Angeles.*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring).

The decisions below cannot be harmonized with these decisions. In fact, both the Court of Appeals and the District Court ignored Petitioner's argument that the "Don't Ask, Don't Tell" policy violates the fundamental *equal protection* right to engage in the political process.

The military's policy of banning gay servicemembers from identifying themselves presents this Court with a unique and unprecedented challenge to a servicemember's right to voice his or her opinion about pending legislation *as a gay person.*[6] "Coming

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on sexual orientation, like classifications based on other immutable characteristics, must be judged by heightened scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 223 (1981).

[6] In this case, the lower courts both relied upon the Fourth Circuit's decision in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, __U.S. __, 117 S. Ct. 358 (1996). However, *Thomasson*, and other cases challenging the military's policy,

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out" is a critical element of the gay civil rights movement in that it allows gays and lesbians to be seen for who they are. However, gay servicemembers who believe that negative attitudes about them will not change without disclosure of their sexual orientation are prohibited from full participation in that debate. As Tracy Thorne's own experiences demonstrate, the military's policy crushed the ability of openly gay servicemembers to "come out" and speak in favor of attempts to end the policy or participate fully in a national political debate. Threatened with an end to their careers and futures, the policy essentially forces gay servicemembers to sit in silence on the sidelines of this debate that is critical to *their* lives.

Lt. Thorne's participation in the 1992 debate to end the military's ban on homosexual servicemembers taught a lesson to others who may have contemplated participation. After Lt. Thorne became an example of what would happen to those who advocated legislative change, hundreds of supporters did not testify before Congress because of fear of retaliation.[7] Similarly, others no doubt refrained from petitioning their elected representatives to end the ban. Thus, although gay servicemembers and their supporters could theoretically speak out against the ban, their voice in the debate was substantially and unequally diminished by the real threat that they would lose their military career and their future

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did not involve an officer speaking out as part of a political debate.

[7] Senator Edward Kennedy alone received comments from over 100 people who wished to testify in opposition to the ban but who were afraid to do so. S. Rep. No. 103-112 (1993).

if they asserted their right to engage in the political process. They therefore could not urge their representatives to end the ban or urge the voting public to support candidates who advocated ending the ban. Not surprisingly, the resulting one-sided "debate" over the "Don't Ask, Don't Tell" policy effectively blocked the democratic process from overcoming prejudices and resulted in the passage of unconstitutional legislation.[8] Any policy that suppresses the participation in the political process of an entire segment of the population -- especially the segment being affected by the national debate -- is noxious to the most basic guarantees of the Constitution.

2. Regardless of the level of scrutiny the Court applies, the "Don't Ask, Don't Tell" policy cannot stand. It is well established that governmental policies based on invidious or irrational prejudice cannot serve a legitimate governmental purpose and are, accordingly, unconstitutional. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court explained:

> Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect. "Public

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[8] Moreover, supporters of the ban also blocked the democratic process from considering all opinions. For example, the Senate Armed Services Committee ignored DOD studies that provided empirical evidence that the presence of open homosexuals would not degrade unit cohesion. S. Rep. No. 103-112 (1993). The same Committee chose not to allow testimony about a GAO study of foreign experiences with homosexual integration. The latter study concluded that expectations of difficulty in integrating open homosexuals were greatly overstated. *Id.* at 313-14.

> officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held."

Id. at 433 (citation omitted); *see also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447-50 (1985). Recently, the Court applied this principle in the context of sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court invalidated a state amendment based upon the language of the amendment and the circumstances surrounding its adoption. The Court stated that these facts "raise[d] the inevitable inference that the disadvantage [that it] imposed [was] born of animosity toward the class of persons affected." Id. at 634. Moreover, as the Court observed, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).[9]

In this case, the legislative history provides overwhelming evidence that the policy's primary purpose, including by its imposition of different rules of

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[9] On Petitioner's equal protection claims, no deference is due to the government because this case involves the military. *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981); Kelly E. Henriksen, Note & Comment, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection As Their Area of Expertise*, 9 Admin. L. J. Am. U. 1273 (Winter 1996). Indeed, deference to the military can set a dangerous precedent. *See Korematsu v. United States*, 323 U.S. 214 (1944).

conduct, was to accommodate prejudice against gays and lesbians.[10] Moreover, in several other cases, the testimony of military personnel has confirmed the prejudicial basis for the policy. For example, in *Cammermeyer v. Aspin*, 850 F. Supp. 910 (W.D. Wash. 1994 both General Otjen and former Assistant Secretary of Defense Dorn "testified to the effect that the government's objection to homosexual service is based solely on the fears and prejudice of heterosexual servicemembers." *Id.* at 925. Bowing to these prejudices by military personnel -- and by members of Congress -- is unconstitutional. *See United States v. Virginia*, 518 U.S. 515, 542-46 (1996) (rejecting similar arguments used to justify denying women admission to VMI).

3. Even if the Court finds that there is no First Amendment or other political participation protection assigned to the statement that raises the presumption in the policy, the equal protection problems with "Don't Ask, Don't Tell" remain. The policy proscribes conduct by homosexual servicemembers that is not similarly proscribed for heterosexual servicemembers such as hand-holding and kissing. Yet, the government, having found that homosexuals are fit to serve in the military, can show no legitimate purpose for limiting those acts

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[10] *See, e.g., Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings on H.A.S.C. No. 103-19 Before the Comm. on Armed Services House of Representatives*, 103d Cong., 1st Sess. at 90-91(1993) (Statement of Col. John Ripley, (referring to gays as "walking repositories of disease" and predicting that the military "will become one of deviants"); *id.* at 319-20 (Statement of Rep. Bob Dornan) ("homosexual[s'] . . . behavior and beliefs directly contradict the cultural beliefs of the overwhelming majority of our middle class").

by its gay and lesbian servicemembers. The only basis on which the government relies for its proscription of these activities is the discomfort these activities may invite on other servicemembers. The reaction of others, however, is not a legitimate basis for the proscription of these activities under the Constitution. *See Palmore*, 466 U.S. 429; *Cleburne*, 473 U.S. 432.[11]

4. Finally, in determining whether legislation violates the Equal Protection Clause, this Court has long recognized that it has never been confined to traditional notions of equality -- particularly when historic stereotypes deny citizens the opportunity to engage in certain careers or educational opportunities. In *United States v. Virginia*, this Court noted that historic fears about the "dangers" of allowing women into certain professions and educational institutions were "once routinely used to deny rights or opportunities." 518 U.S. at 542-46.[12] The Court therefore rejected the notion that

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[11] This case is *not* about the military's criminal prohibition against sodomy and other forms of sexual conduct that apply to all servicemembers, regardless of sexual orientation. *See* 10 U.S.C. §§ 801 *et seq.* It is about the acts that are not prohibited by the Military Code but that are prohibited by the "Don't Ask, Don't Tell" policy -- acts prohibited for gay and lesbian servicemembers only. For example, a heterosexual servicemember who does more than that which is proscribed for homosexuals under the Act -- such as announcing an intent to commit sodomy or some other act prohibited by the Military Code with someone of the opposite sex or a propensity to do so on a regular basis -- does not implicate the Act's proscriptions. In addition, hand-holding or hugging by two people of the opposite sex -- even if unmarried -- garner no reaction by the policy, while the same conduct by two members of the same sex may result in discharge

[12] Among many others, the Court noted that women were denied police careers "based on fears that their presence would

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the admission of women to VMI "would downgrade VMI's stature" or "would destroy . . . the sense of decency that still permeates the relationship between the sexes." *Id.* at 542-46 and 555 n.20.

This Court has also recognized that historic notions of equality will not restrict its analysis of whether legislation is unconstitutional. In *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966), the Court explained,

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause do change.

Id. at 669 (citing *Brown v. Board of Educ.*, 349 U.S. 294 (1955)).

In this case, the military and Congress have relied upon historic stereotypes to deny a military career and education to gays and lesbians who reveal that they are

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undermine male solidarity, deprive male partners of adequate assistance, and lead to sexual misconduct." *United States v. Virginia,* 518 U.S. at 544 (internal quotations and citations omitted). These same arguments were relied upon by the military and Congress in implementing the "Don't Ask, Don't Tell" policy.

gay. The military also believes that service by open and honest gays and lesbians "would be against their self-image, that [of] the macho man -- having gays and lesbians in the force would not be in keeping with the image they see of themselves." *Nightline,* ABC News, May 19, 1992, *available in* LEXIS, News Library, ARCNWS File (comments of former Assistant Secretary of Defense Lawrence Korb). This Court should not allow such historic stereotypes to deny gay and lesbian citizens a career in the military, the educational opportunities that the military and its educational institutions present, or the prospect of training and networking that inevitably leads to promising civilian career opportunities after military service. *Cf. United States v. Virginia*, 518 U.S. at 551-54 (comparing educational and employment opportunities for VMI and VMIL graduates); *Rostker v. Goldberg*, 453 U.S. 57, 74 n.11 (denying a challenge to the all-male draft and noting that nothing in the all-male draft registration "restricts . . . opportunities for women to volunteer for military service"). In petitioner's case, the denial of the educational opportunities was particularly acute: his Commander noted in the fitness report prepared after Lt. Thorne's appearance on *Nightline*: "Has my highest Possible *[sic.]* recommendation for promotion, command and further education at the postgraduate level." COA App. 170.

II. Discharges of Gay and Lesbian Servicemembers Under "Don't Ask, Don't Tell" Are Increasing at An Alarming Rate.

Despite the purported tolerance espoused by the policy, gay and lesbian servicemembers are being discharged under the policy at increasing and alarming rates. The number of gay and lesbian servicemembers discharged under "Don't Ask, Don't Tell" has increased each year since 1994. C. Dixon Osburn et al., *Servicemembers Legal Defense Network, Conduct Unbecoming: The Third Annual Report On "Don't Ask, Don't Tell, Don't Pursue"* (1997). Almost 1,000 servicemembers were discharged under the policy in 1997 alone, a number that *surpasses* the number discharged annually under the former ban on homosexuals in the military between 1990 and 1992. *Id.*; ABC Nightly News, Apr. 6, 1998, *available in* LEXIS, News Library, ARCNWS File.

There is no reason to believe that these numbers will decrease. The "Don't Ask, Don't Tell" policy is administered and enforced by the same bigotry that gave it birth. Gay and lesbian servicemembers who want to serve their country while living an open and honest life are the victims. This victimization will continue absent guidance from this Court.

CONCLUSION

The United States Constitution prohibits the suppression of expression and denial of equal protection on the basis of bigotry and prejudice. The "Don't Ask, Don't Tell" policy ignores these constitutional guarantees. The petitioner's writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1121

TRACY THORNE,

Plaintiff-Appellant,

versus

UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM J. PERRY, Secretary of Defense; UNITED STATES DEPARTMENT OF THE NAVY; JOHN H. DALTON, Secretary of the Navy,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. T. S. Ellis, III, District Judge. (CA-95-369)

Submitted: March 31, 1998 Decided: April 9, 1998

Before MURNAGHAN and NIEMEYER, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Tracy Thorne, Appellant Pro Se. Edward Roy Hawkens, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Lieutenant Tracy Thorne appeals an order of the district court upholding his involuntary discharge from the United States Navy on account of his acknowledged homosexuality. 916 F. Supp. 1358 (E.D. Va. 1996). He contends that the "Don't Ask, Don't Tell" plan, *see* 10 U.S.C. § 654 (1994), and implementing regulations, under which he was discharged are unconstitutional. We have held to the contrary. *See Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 65 U.S.L.W. 3305, 65 U.S.L.W. 3309 (U.S. Oct. 21, 1996) (No. 96-1). We have considered and rejected Thorne's remaining claims on appeal. The judgment of the district court is therefore affirmed. We deny Thorne's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
ALEXANDRIA DIVISION.

Civil Action No. 95-369-A.

Tracy THORNE, Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et. al., Defendants.

Nov. 20, 1996.

Discharged service officer brought action against the United States Department of Defense (DoD), claiming DoD's "Don't Ask, Don't Tell" plan governing military service by homosexuals violated his First Amendment rights. Both parties moved for summary judgment. The District Court, 916 F.Supp. 1358, directed parties to supplement the record. The District Court, Ellis, J., held that: (1) "Don't Ask, Don't Tell" plan was not facially invalid on ground that presumption of prohibited conduct arising from service member's declaration of homosexuality was irrebuttable, so that plan impermissibly targeted speech, rather than conduct, and (2) officer failed to prove that plan, as applied to him, was unconstitutional.

Summary judgment for DoD granted; summary judgment for officer denied.

Mark A. Behrens, Crowell and Moring, Washington, DC, for Plaintiff.

Sylvia T. Kaser, Department of Justice, Civil Branch, Washington, DC, for Defendants.

MEMORANDUM OPINION

ELLIS, District Judge.

Plaintiff in this action attacks the Department of Defense's ("DoD") controversial "Don't Ask, Don't Tell" Plan (the "Plan") as violative of the First Amendment. It is not the "Don't Ask" but the "Don't Tell" portion of the Plan that is the target of plaintiff's constitutional challenge. In brief, plaintiff contends that the Plan, on its face and as applied, punishes speech as opposed to conduct.

In a Memorandum Opinion dated March 4, 1996, the Court focused on plaintiff's facial challenge and followed an analytical path that, distilled to its essence, may be summarized as follows:

> (i) The heart of the Plan is the premise that a service member's declaration of homosexuality gives rise to a presumption that the person engages in or will engage in prohibited homosexual conduct;
>
> (ii) The presumption purports to be rebuttable, but plaintiff contends that it is, in fact, irrebuttable and that, as a consequence, a declaration of homosexuality invariably results in dismissal from the service;
>
> (iii) Whether the Plan's presumption is rebuttable is of constitutional significance. If the presumption is irrebuttable, then the Plan is a speech restriction subject to heightened scrutiny under the First Amendment. On the other hand, if the presumption is rebuttable short of recantation, then the Plan's focus is conduct not speech and the First Amendment is not implicated here;

(iv) But because the record then before the Court precluded a confident conclusion concerning the presumption's rebuttability, the parties were directed to supplement the record. *Thorne v. United States Department of Defense,* 916 F.Supp. 1358, 1367 (E.D.Va.1996) ("*Thorne* I").

Four weeks after the issuance of *Thorne I,* the Fourth Circuit, sitting *en banc,* decided another case involving a First Amendment challenge to the Plan. *Thomasson v. Perry,* 80 F.3d 915 (4th Cir.), *cert. denied,* ___ U.S. ___, 117 S.Ct. 358, 136 L.Ed.2d 250 (1996). There, the majority held that the presumption in the Plan was rebuttable and that, as a consequence, it targeted conduct, not speech. Although *Thorne I* antedated *Thomasson,* the Fourth Circuit did not cite or refer to *Thorne I* in its decision. Accordingly, the task at hand is twofold: (1) to determine whether *Thomasson* is dispositive of this case; and (2) to consider whether the enhanced factual record supports plaintiff's contention about the presumption's irrebuttability in practice. Put another way, this Court must determine whether the Fourth Circuit's decision supersedes *Thorne I* and whether the supplemental information forecloses plaintiff's constitutional claims.

I

The facts of this case, already set out in *Thorne I,* are essentially undisputed. *Thorne,* 916 F.Supp. at 1361-62. Plaintiff, Tracy Thorne, served more than six years as a commissioned officer in the United States Navy. Thorne's military career began in 1988 when he entered Aviation Officers Candidate School. He ultimately earned the designation of Naval Flight Officer. On May 19, 1992, he publicly disclosed his homosexuality during an appearance on the ABC News program "Nightline." Soon thereafter, the Navy initiated proceedings to separate Thorne from the service.

Following numerous procedural twists and turns,[1] the Secretary of the Navy accepted a Board of Inquiry's recommendation and honorably discharged Thorne in March 1995. Thorne then filed this action challenging the Plan.

This action came before the Court on the parties' cross-motions for summary judgment. In its March 4 opinion, as modified by an Order dated March 12, 1996, *Thorne v. United States Department of Defense*, C.A. No. 95-369-A (March 12, 1996),[2] the Court directed the parties to submit

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[1] The policy in effect at the time of Thorne's televised disclosure discharged service members, and denied enlistment to civilians, solely on the basis of homosexual orientation. DoD Directive 1332.14, Enlisted Administrative Separations, encl. 8 (1981); DoD Directive 1333.30, Separation of Regular Commissioned Officers for Cause, encl. 2 (1981), reprinted in 32 C.F.R. pt. 41, app. A ¶ (h) (1994). Under that policy, a Board of Inquiry unanimously recommended that Thorne be discharged on the basis of his status. The Board then submitted the proceedings and its recommendation to the DoD for final review. Prior to issuing a decision in the matter, the DoD suspended all pending discharge proceedings pursuant to an executive order issued directing the Secretary of Defense to review the policy. The Plan emerged from that review and supplanted the policy. Unlike its predecessor policy, the Plan, at least in theory, focuses on conduct, not status. In light of this change, the Navy reinstated Thorne, but reconvened discharge proceedings against him pursuant to the Plan. This case challenges only the Plan, not the former homosexual exclusion policy.

[2] This Order clarified *Thorne I* and the accompanying March 4, 1996 Order as follows:

Because the Court considered Thorne's facial challenge to the "Don't Ask Don't Tell" plan in addition to his as-applied challenge, the Court invited the parties to submit further evidence relating to how the plan is actually implemented. Such evidence may be relevant to the construction of the plan and hence to a determination of whether the plan amounts to a speech restriction on its face.

In addition, the parties are invited to submit any additional evidence they wish relating to the application of the plan to Lt. Thorne in particular, which would be relevant to his as-applied challenge. Any such additional evidence is to be submitted pursuant to the schedule set forth in the March 4 Order.

supplemental memoranda focusing on whether the presumption embodied in the Plan is actually rebuttable short of a service member's recanting the statement declaring his or her homosexuality. The parties complied, submitting additional facts about the DoD's implementation of the Plan. In particular, plaintiff submitted the administrative records of eight "Don't Ask, Don't Tell" cases where service members avoided involuntary separation from the military.

II

The threshold question is whether, as the government argues, *Thomasson* requires dismissal of this case, thus, making a review of the supplemented record neither necessary nor appropriate. Thorne disagrees, arguing that *Thomasson*, read closely, leaves unresolved whether the Plan's presumption is rebuttable short of recantation and that, as a consequence, the enhanced factual record merits evaluation.

In *Thomasson*, the majority concluded at the outset that the presumption was, indeed, rebuttable. In reaching this conclusion, the *Thomasson* majority relied on its understanding that "other [service] members subject to discharge under the statements provision have successfully demonstrated that they lack a propensity or intent to engage in homosexual acts." *Thomasson*, 80 F.3d at 932 (citing *Richenberg v. Perry*, 909 F.Supp. 1303 (D.Neb.1995); *Able v. United States*, 880 F.Supp. 968 (E.D.N.Y.1995)).[3] Of course, from this followed, ineluctably, the conclusion that the Plan merely used speech as evidence of prohibited conduct and

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[3] Subsequent to *Thomasson*, the Eighth Circuit affirmed *Richenberg* and the Second Circuit vacated and remanded *Able*. *See Richenberg v. Perry*, 97 F.3d 256 (8th Cir.1996); *Able v. United States*, 88 F.3d 1280 (2d Cir.1996).

did not punish speech directly. Hence, the Plan targeted conduct and was content-neutral.[4] *Id.* at 933.

On its face, *Thomasson* is dispositive here for it seems to resolve the centrally important question of the presumption's rebuttability. Yet, a plausible, if not ultimately persuasive, argument can be made that *Thomasson* is not dispositive on the rebuttability of the presumption because the two cases on which it relies in finding the presumption rebuttable arguably do not support this point. Neither case directly addresses whether anything short of recantation can serve to rebut the presumption. Although the district court in *Richenberg v. Perry*, 909 F.Supp. 1303 (D.Neb.1995), noted that "seven service members thus far have successfully rebutted the presumption," *id.* at 1313, it did not reveal how this was accomplished. It might conceivably have been by recantation, which, of course, does not rebut the presumption but instead denies or retracts the factual basis for the presumption. And in *Able*, the district court rejected the government's proffered examples of service members who had escaped discharge as mere "aberrations," holding that the presumption was, in fact, irrebuttable in practice. Thorne argues, not unreasonably, that *Richenberg* and *Able* are unpersuasive evidence of the presumption's rebuttability and that *Thomasson* is, to this extent, not dispositive.

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[4] The Fourth Circuit then contemplated the level of judicial scrutiny that should be accorded to content-neutral military regulations of speech. *Id.* at 933-34. The majority adopted the deferential standard of review from *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980) and *Goldman v. Weinberger*, 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986). And it found that standard easily satisfied. *Id.* at 933-34.

Next, the majority rejected Thomasson's as-applied challenge on the ground that he had freely chosen not to come forward with any evidence to rebut the presumption. *Id.* at 932.

Ultimately, it is unnecessary to decide whether *Thomasson* is dispositive on the essentially factual issue of the presumption's rebuttability[5] because even assuming the factual record at bar is more complete than the *Thomasson* record, this record, too, supports the conclusion that the presumption is rebuttable.

III

The supplemented record in this case consists of the records of eight separation proceedings under the Plan.[6] In all eight, the Board of Inquiry or Board of Review assigned to each proceeding found the presumption rebutted.[7] In four of the eight, the service member's promise to remain celibate was accepted as an effective and sufficient rebuttal of

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[5] Of course, it is also possible that the DoD's interpretation and implementation of the Plan may change over time and hence that the rebuttability of the presumption may likewise change from rebuttable to irrebuttable. Thus, the presumption's rebuttability is essentially a factual issue that may deserve reexamination later if there is evidence of change in the DoD's interpretation and implementation of the Plan.

[6] For purposes of this Memorandum Opinion, the eight cases are numbers 1 through 8 in roughly chronological order of the dispositions by Boards of Inquiry or Review. The first case, Case No. 1 was apparently disposed of on June 22, 1994 and the last, Case No. 8 was apparently disposed of on December 19, 1995. Cases Nos. 2 through 7 bear dates of disposition between these two dates.

[7] The government did not produce a transcript of the administrative proceeding for Case No. 7. Although the service member rebutted the presumption, it is impossible to determine how this was accomplished. Accordingly, Case No. 7 is of little value here.

the presumption.[8] In another case, the service member rebutted the presumption by showing that the statement had been uttered in confidence during a counseling session.[9] Finally, two service members rebutted the presumption by expressing their sexual confusion and by disavowing their prior

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[8] In Cases Nos. 1, 4, 6, and 8, the targeted service members rebutted the presumption, in part, by promising to refrain from all homosexual activity. Case No. 1 involved a female sailor who admitted her homosexuality because of her concern about status-based discrimination. As her rebuttal, the service member declared that she "fully under[stood] and intend[ed] to follow the rules and regulations prohibiting homosexual conduct." Case No. 4 involved a Navy Lieutenant who declared that she was a lesbian, but claimed that she had intended her statement to convey only a message about her sexual orientation: "when I made that statement that I am a lesbian, that statement was to indicate my sexual orientation. It, in no way, was meant to imply any propensity or intent or desire to engage in prohibited conduct." Case No. 6 involved an airman who acknowledged his homosexuality on two occasions and who possessed a picture of himself kissing another man. In response to the inquiry whether he could eschew committing any homosexual acts, the service member responded that "[t]o the best of my ability, I believe that fully, especially with God in my life, I believe that fully." And Case No. 8 involved an eighteen-year veteran of the Navy who confessed his homosexuality to his Commanding Officer while requesting leave to care for his dying male partner. The Board of Review reversed the Board of Inquiry's unanimous recommendation to separate the service member, finding that he only sought to convey the dire importance of his request and that his promise to abide by all military regulations was credible. For further discussion of this case, see *infra* pp. 928-929. In these four cases, the service members' promises to remain celibate were decisive to their effective rebuttals.

[9] In Case No. 3, a nuclear field mechanic, who approached his ship's drug and alcohol counselor about his alcohol problems, volunteered that he was gay after being encouraged to be frank about the source of his underlying tension. After the ship returned to port, the counselor disclosed that privileged communication to the mechanic's Executive Officer (XO). The XO then confronted the service member about his status, which he subsequently confirmed. Notwithstanding his two statements of homosexuality, which he did not disavow, the Board of Inquiry unanimously voted to retain him, finding that the military's evidence did not sufficiently demonstrate that he engaged in, intended to engage in, or had a propensity to engage in illicit homosexual acts.

statements of homosexuality.[10] Taken together, the records of these eight proceedings point persuasively, if not decisively, to the conclusion that the Plan's presumption, as applied by the DoD, can be rebutted short of recantation.

Seeking to avoid this conclusion, Thorne points out that seven of the eight cases do not deserve any weight in determining whether the presumption is rebuttable because they predate a DoD memorandum, issued by the DoD's General Counsel Judith A. Miller, essentially directing Boards of Inquiry to reject any distinction between status and conduct[11] and to separate service members solely on the basis of their

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[10] In other words, Cases Nos. 2 and 5 involved rebuttal by recantation. The service member in Case No. 2 claimed to be "confused about [his] sexual preference" and declared that he was "not engaged in any type of sexual activity . . . with anyone." Likewise, in Case No. 5, an admitted bisexual but married Naval combat systems officer recanted his interest in men: "I want to raise children. I want to be a parent. I'm not going to get that if I go with a guy. . . . I believe in monogamy. I believe in a stable family life. Those are things that aren't going to change, even if I did lose my wife."

[11] According to the Miller memorandum:

> A member may not avoid the burden of rebutting the presumption merely by asserting that his or her statement of homosexuality was intended to convey only a message about sexual orientation, as defined in the Directives, and not to convey any message about propensity or intent to engage in homosexual acts. To the contrary, by virtue of the statement, the member bears the burden of proof that he or she does not engage in, and does not attempt, have a propensity, or intend to engage in homosexual acts. If the member in rebuttal offers evidence that he or she does not engage in homosexual acts or have a propensity or intent to do so, the offering of the evidence does not shift the burden of proof to the government. Rather, the burden of proof remains on the member throughout the proceeding.

Memorandum at 2 (citations omitted).

declarations of homosexuality. *Memorandum for the Military Departments. Subject: Policy on Homosexual Conduct in the Armed Forces* (August 18, 1995) ("Miller memorandum"). Thorne argues that because the Miller memorandum, fairly read, precludes rebuttal of the presumption, cases decided under the Plan prior to its issuance are entitled to scant, if any weight, and that the Miller memorandum establishes the irrebuttability of the presumption.

As it happens, the eighth case, decided after the issuance of the Miller memorandum, robs this argument of any force. There, an eighteen-year veteran surface warfare officer was retained by the Navy notwithstanding his declaration of homosexuality. The facts are instructive. In mid-April, 1995, the officer approached his Commanding Officer (CO) in a distraught state and requested an opportunity to speak with him in private. At the time of this confidential conversation, the officer's male companion was in the last stages of AIDS. A heartfelt desire to attend to the final needs of his dying, male companion moved the officer to request the CO to grant him leave. In support of this request, the officer explained the circumstances, in the course of which the officer disclosed his homosexuality. The CO pointedly asked him whether he was also HIV positive, but the officer emphatically responded that he was not. As required by the Plan, the CO reported the officer's disclosure of homosexuality.

Thereafter, on October 6, 1995, the Navy convened a Board of Inquiry to investigate the officer's statement and to determine his future in the military. In an unsworn statement to the Board, the officer attempted to rebut the presumption by stating that: "Because I am a naval officer, you may presume that I engage in . . . and intend to engage in the duties and responsibilities that I have been charged with since taking my oath as a naval officer." He also pledged that: "As I stand before you, I do not intend to engage in

any activities which are contrary to Navy or Department of Defense regulations." By unanimous vote, the Board of Inquiry found that he had uttered a statement of homosexual orientation and had failed to rebut the presumption the statement created.

Subsequently, however, a Board of Review overturned the Board of Inquiry's decision and retained the openly gay officer. In its memorandum to the Secretary of the Navy, the Board of Review explained that the Board of Inquiry had erred in finding that the officer had not rebutted the presumption. Among the Board of Review's reasons for so ruling was that the officer had rebutted the presumption by pledging to refrain from homosexual conduct.[12]

Thorne seeks to diminish the significance of this eighth case by calling it an "aberration." Specifically, he discounts its significance simply because the Board of Review contravened the Miller memorandum. In short, Thorne seeks to invalidate the Plan on its face even though the Navy retained an openly gay officer. In this respect, Thorne borrows a page from the district court's play book in *Able*. There, the district court discounted three cases in which the presumption was rebutted (all of which predated the Miller memorandum) by characterizing them as "aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption." *Able,* 880 F.Supp. at 976.

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[12] As further support for this finding, the Board cited a DoD-funded study showing that homosexual service members, in my instances, successfully refrain from engaging in prohibited acts as well as the officer's negative tests for HIV. Other grounds relied on by the Board included: (i) the government's failure to present persuasive evidence of the officer's homosexual conduct; (ii) the officer's past performance and credibility over the span of his career; (iii) the stressful circumstances under which the officer made the statement and his intent in doing so; and (iv) the fact that the introduction of the Miller memorandum tainted the result of the Board of Inquiry's proceeding.

Thorne's approach fails for the same reason the Second Circuit expressly rejected this "aberration" theory. *See Able v. United States,* 88 F.3d 1280, 1297-98 (2d Cir.1996). Essentially, that theory contradicts the stringent standard of review for facial constitutional challenges, which is simply that "the challenger must establish that no set of circumstances exists under which the Act would be valid." *Jordan v. Jackson,* 15 F.3d 333, 343-44 (4th Cir.1994) (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)).[13] Even discounting altogether seven of the eight cases in which the presumption was rebutted, Thorne's facial challenge cannot succeed in light of the stringent standard of review promulgated by the Fourth Circuit in *Jordan.* In other words, the fact that at least one service member rebutted the presumption without disavowing his statement of homosexuality in this post-Miller memorandum era fatally undercuts Thorne's facial constitutional challenge.

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[13] Recently, some Justices of the Supreme Court have begun to question the continuing validity of the *Salerno* rule. This debate recently erupted in *Janklow v. Planned Parenthood, Sioux Falls Clinic,* ___ U.S. ___, 116 S.Ct. 1582, 134 L.Ed.2d 679 (1996). *Compare id.* at ___, 116 S.Ct. at 1582 (Stevens, J., concurring in the denial of certiorari) (asserting that a statute may be facially vulnerable if unconstitutional in a "large fraction" of cases), with *id.* at ___, 116 S.Ct. at 1584 (Scalia, J., dissenting from the denial of certiorari) (arguing that a statute may be facially vulnerable only if unconstitutional in every set of circumstances). For cases discussing this conflict and the resulting uncertainty, see *Able,* 88 F.3d at 1297-98; *Ingebretsen v. Jackson Public School Dist.,* 88 F.3d 274, 285 (5th Cir.), *cert. denied,* ___ U.S. ___, 117 S.Ct. 388, 136 L.Ed.2d 304 (1996); *Florida League of Professional Lobbyists v. Meggs,* 87 F.3d 457 (11th Cir.1996). In any event, the Fourth Circuit has expressly adopted *Salerno*'s "no circumstances" standard.

As for Thorne's as-applied challenge, that attack fails as well because Thorne made no attempt to rebut the presumption in the administrative proceeding. In fact, Thorne's counsel admitted at the separation hearing that "[w]e have not and will not rebut the presumption," contending instead that the government failed to meet its threshold burden of proving a statement that demonstrates a propensity or intent to engage in homosexual conduct. Unfortunately for Thorne, the Fourth Circuit in *Thomasson* disagreed with that same argument, holding that the declaration of one's homosexuality alone and unrebutted provides sufficient evidence of a propensity to engage in prohibited acts. *Thomasson,* 80 F.3d at 930. Thus, *Thomasson* held that the DoD's use of a service member's declaration of homosexuality to give rise to a rebuttable presumption of prohibited conduct is not a First Amendment violation.

For the foregoing reasons, Thorne's First Amendment attack on the Plan fails. Accordingly, Thorne's motion for summary judgment must be denied, while the government's similar motion must be granted.[14]

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[14] This Memorandum Opinion focuses very narrowly on a specific First Amendment challenge to the Plan. Thus, nothing in the opinion or the result reached should be construed as reflecting the Court's views, irrelevant here, on the Plan's morality or its wisdom as public policy.

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. VIRGINIA,
ALEXANDRIA DIVISION.

Civil Action No. 95-369-A.

Tracy THORNE, Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE et al., Defendants.

March 4, 1996.

Homosexual service officer brought wrongful discharge suit against United States Department of Defense. Both parties moved for summary judgment. The District Court, Ellis, J., held that: (1) officer was not required to exhaust all administrative remedies before filing suit in federal court; (2) statute discharging vocal homosexuals from military was restriction on speech; (3) on its face, regulation implementing statute discharging vocal homosexuals was restriction on conduct; (4) record was too sparse to permit conclusion that implementation of statute and regulations created speech restriction; (5) plan discharging vocal homosexuals is content-based speech restriction; (6) content-based speech restriction in military context is subject to heightened scrutiny; and (7) plan discharging vocal homosexuals did not substan-

tially further government's important interest in unit cohesion and therefore violates First Amendment.

So ordered.

Patrick W. Lee, Luther Zeigler, Amy J. Mauser, Kathryn D. Kirmayer, Mark A. Behrens, Mary Bowman Hauck, Christopher M. Farris, Crowell & Moring, Washington, D.C., for plaintiff.

Janet Reno, United States Attorney General, Frank W. Hunger, Assistant Attorney General, Helen F. Fahey, United States Attorney, Dennis E. Szybala, Assistant United States Attorney, Alexandria, Virginia, David J. Anderson, Vincent M. Garvey, Sylvia T. Kaser, Department of Justice, Washington, D.C. (Hack Wigman, United States Department of Defense, Office of the General Counsel, Washington, D.C., Cdr. Robert P. Monahan, Lt. Susan C. Stewart, U.S. Department of the Navy, Office of the Judge Advocate General, Arlington, Virginia, of counsel), for defendants.

MEMORANDUM OPINION

ELLIS, District Judge.

This case presents the question whether the government's "Don't Ask, Don't Tell" statutory and regulatory plan with respect to military service by homosexuals violates the First Amendment.[1]

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[1] A number of district courts have considered this question, reaching different conclusions on a variety of grounds. *Compare Richenberg v. Perry,* 909 F.Supp. 1303 (D.Neb.1995) (upholding plan against First Amendment challenge) *and Selland v. Perry,* 905 F.Supp. 260 (D.Md. 1995) (same) *and Thomasson v. Perry,* 895 F.Supp. 820 (E.D.Va. 1995) (same) *and Philips v. Perry,* 883 F.Supp. 539 (W.D.Wash. 1995) (same)

I

By all accounts, had Lieutenant Thorne not publicly announced that he was a homosexual, he would be an exemplary Naval Officer. In May of 1989, Thorne began his military career by entering Aviation Officer Candidate School. He quickly excelled, receiving Outstanding Achievement Awards for his academic excellent and his physical training. He was first in his class in each of the basic, intermediate, and advanced portions of his training, was placed on the Commodore's List for academic and flight achievement, and was named top student flight officer.

After completing his tenure at AOCS and earning the designation of Naval Flight Officer, Thorne spent thirteen months training as a bombardier/navigator in the A-6 Intruder. He then joined Attack Squadron VA-65 at the Naval Air Station in Oceana, Virginia, where he continued to excel, impressing his commanding officers with his leadership and aviation skills.

In the spring of 1992, Thorne decided to announce publicly that he was a homosexual. On May 19, 1992 he sent a letter to his commanding officer in which he revealed his intention to disclose his sexual orientation. That night, he appeared on national television on the ABC news program "Nightline" and told the viewing audience that he was gay. As a result, on June 9 Thorne received a Notification of a Board of Inquiry Proposed Action to separate Thorne from the service because of his statements on television, in accordance with the military's policy regarding service by

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with Able v. United States, 880 F.Supp. 968 (E.D.N.Y. 1995) (striking plan down as violative of the First Amendment). None proceeds along quite the same path as that followed in this memorandum opinion. Also, no circuit court has yet weighed in on the issue, although the *Able* case is on appeal in the Second Circuit and the Fourth Circuit has heard the *Thomasson* case *en banc.*

homosexuals in effect at the time. Under that policy, a member of the armed services would be separated from the armed services if a finding was made that the member (1) engaged in homosexual acts, unless the member proved that the conduct was an aberration unlikely to recur and that his continued service was in the best interest of the military; (2) stated that he was a homosexual or bisexual unless a further finding was made that the member was not a homosexual or bisexual; or (3) married or attempted to marry a person of the same sex unless a further finding was made that the member was not a homosexual. At the Administrative Show Cause Hearing, the Board of Inquiry unanimously recommended that Thorne be discharged.

While Thorne's discharge proceedings were pending, President Clinton directed the Secretary of Defense at the time to review the Department of Defense policy concerning gays in the military. On February 3, 1993, the Secretary issued an interim policy that placed gay and lesbian service members in the process of being discharged because of their sexual orientation on standby inactive reserve status, pending the promulgation of a new policy. Accordingly, the Attorney General suspended Thorne's discharge on April 26, 1993, but nonetheless removed Thorne from active duty and placed him on inactive reserve status.

Thereafter, on July 19, 1993, the Secretary announced a new policy concerning homosexuals in the military. This policy, a precursor to the plan at issue here, allowed homosexuals to serve provided they did not engage in homosexual conduct. Implementing regulations were scheduled to be issued by October 1, 1993. When that date passed without the appearance of the new regulations, the Navy Office of Personnel indicated its intent to return Thorne to active duty. The Secretary of the Navy rescinded that order on November 3, and two weeks later Thorne filed suit in the District Court for the District of Columbia alleging unlawful discharge.

Shortly thereafter, Congress formally enacted the policy contained in the July 19 directive as § 571 of the National Defense Authorization Act for Fiscal Year 1994, Pub.L. No. 103-160, 107 Stat. 1670-73 (codified at 10 U.S.C. § 654). President Clinton signed the policy into law on November 30, 1993. Under this new legislation, popularly known as the "Don't Ask, Don't Tell" plan, a service member will be separated from the armed forces if "the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in." 10 U.S.C. § 654(b)(2).[2] Congress also directed the Secretary of

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[2] The statute also calls for the separation of a service member in the following circumstances:

> (1) [T]he member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in [the] regulations, that the member has demonstrated that—
>
> (A) such conduct is a departure from the member's usual and customary behavior;
>
> (B) such, conduct, under all the circumstances, is unlikely to recur;
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
>
> (E) the member does not have a propensity to engage in homosexual acts; [or]
>
> (3) [T]he member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b)(1) & (3). Those aspects of the statutory plan are not at issue in this case.

Defense to issue regulations implementing the new statute. In light of this new legislation, the Assistant Secretary of Defense announced on January 6, 1994 that service members in the process of being discharged on the basis of their sexual orientation, including Thorne, would be reinstated and then reconsidered for discharge under the "Don't Ask, Don't Tell" legislation and its implementing regulations. Given this, the parties in the District of Columbia suit entered into a stipulation that Thorne would be returned to active duty and that the Navy could again seek to discharge him under the soon-to-be-promulgated regulations, and the suit was voluntarily dismissed. Pursuant to this agreement, Thorne returned to active duty on January 31, 1994 and was assigned to Air-714, Information Systems. Once again, he proved to be an outstanding officer, performing his duties in exemplary fashion. Air-714's commanding officer ranked Thorne Number 1 in the command and recommended Thorne for early promotion, stating that his "accomplishments [were] unparalleled" and that his "leadership vision embraces the very qualities most sought after throughout the fleet."

Pursuant to Congress's direction, the Department of Defense promulgated regulations implementing the policy embodied in 10 U.S.C. § 654 in DoD Directives 1332.14 and 1332.30.[3] Thereafter, on March 29, 1994, Thorne was again notified of an Administrative Show Cause Hearing to be held by a Naval Board of Inquiry on July 11, 1994. At that hearing, the Navy presented no live testimony, but offered several documents, including Thorne's letter of May

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[3] Directive 1332.14, which applies to enlisted personnel, and Directive 1332.30, which applies to officers, are substantially similar. Because Thorne, as an officer, was governed by Directive 1332.30, only that Directive will be referred to in the course of this opinion.

19, 1992 to his commanding officer, a transcript of the Nightline broadcast, and statements of two of his squadron mates. Thorne called three witnesses. Commander Luigart, Thorne's commanding officer at the time, testified to Thorne's outstanding service and qualifications. Dr. Lawrence Korb, Director for the Center for Public Policy Education at the Brookings Institute and former Assistant Secretary of Defense, testified that a statement of one's sexual orientation does not indicate a propensity to engage in homosexual conduct and that the asserted policy justifications for the new policy would not be compromised by allowing Thorne to remain in the Navy. Finally, Lieutenant Sutko, a heterosexual, testified that he had known Thorne since October 1989, that he had shared a townhouse with him for a year, that he had never known Thorne to behave in an inappropriate manner, and that he would have no concerns about flying with or sharing close quarters with Thorne. Thorne also offered numerous statements and reports that concluded that the "Don't Ask, Don't Tell" policy, as embodied in § 654, was based on irrational fears and prejudices.

On the record presented, the Board of Inquiry unanimously found that Thorne's statement that he was a homosexual gave rise to a rebuttable presumption that he had a "propensity" to engage in prohibited conduct and that Thorne had failed to rebut that presumption. Accordingly, the Board recommended that Thorne be honorably discharged. That recommendation was transmitted to the Secretary of the Navy, who, on March 7, 1995, accepted the Board's findings and ordered Thorne's discharge. Thorne was discharged on March 9, 1995 and filed this suit on the same day. The matter is now before the Court on the parties' cross-motions for summary judgment.

II

As a threshold matter, the government contends that the Court is without jurisdiction over this case because Thorne has failed to exhaust his administrative remedies. In this regard, Thorne admits he did not present his case to the Navy Board for Correction of Military Records ("NBCMR").

To be sure, litigants are generally required to exhaust all administrative remedies before filing suit in federal court. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52, 58 S.Ct. 459, 463-64, 82 L.Ed. 638 (1983). Yet, "[t]he doctrine is not an absolute bar to judicial consideration and where justification for invoking the doctrine is absent, application is unwarranted." *Downen v. Warner,* 481 F.2d 642, 643 (9th Cir.1973). Specifically, exhaustion is excused "if the [administrative] remedies do not provide an opportunity for adequate relief . . . or if substantial constitutional questions are raised." *Muhammad v. Secretary of the Army,* 770 F.2d 1494, 1495 (9th Cir.1985); *see also Von Hoffburg v. Alexander,* 615 F.2d 633, 638 (5th Cir.1980); *Downen,* 481 F.2d at 643 (1973); *Walmer v. U.S. Dep't of Defense,* 835 F.Supp. 1307, 1311 (D.Kan.1993). Thorne's claim fits this description. First, his claim depends entirely on constitutional questions, and "[r]esolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Glines v. Wade,* 586 F.2d 675, 678 (9th Cir.1978), *rev'd on other grounds sub nom., Brown v. Glines,* 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980); *see also Downen,* 481 F.2d at 643 (holding that petitioner was not required to raise First Amendment claim to the Air Force Board for the Correction of Military Records). Second, it is not clear that the NBCMR even has the authority to strike down a military regulation as unconstitutional on its face. *See Glines,* 586

F.2d at 678 ("The [Air Force BCMR] was never intended by Congress to resolve the essentially legal issues involved in this case."); *Walmer,* 835 F.Supp. at 1310 (Government "admitted in oral argument that the [Army BCMR] does not have the authority, except on an as-applied basis, to hold a military policy unconstitutional, and that, in fact, it is impermissible for the [Army BCMR] to strike down a military policy on its face."). Accordingly, the exhaustion-of-remedies doctrine is inapplicable here and the matter is therefore properly before the Court.

III

A. Conduct or Speech: The Statute

Thorne contends that the "Don't Ask, Don't Tell" plan, both on its face and in the manner in which it is applied, violates the Free Speech Clause of the First Amendment. The government contends that the plan is directed at conduct not speech and therefore does not impinge on Thorne's First Amendment rights. The crucial first step in the analysis, therefore, is to determine whether the plan merely regulates conduct, in which case the First Amendment is not implicated, or whether the plan is in fact a restriction on speech, in which case it must be subjected to the appropriate degree of judicial scrutiny.

The government's position is that the statement "I am gay" merely gives rise to a presumption that the person engages in or has a propensity to engage in certain forms of conduct that are prohibited in the military. The service member then has the opportunity to rebut that presumption by convincing a panel of military officers that he in fact does not engage in, nor does he have a propensity to engage in, the prohibited conduct. The speech to the effect that "I am gay", according to the government, is only relevant insofar as it is evidence of that person's conduct.

Thorne responds that the presumption, both on the face of the "Don't Ask, Don't Tell" statute and accompanying regulations and in the manner in which the statute and regulations are applied, is an irrebuttable one. If he is correct in either regard, then the statutory and regulatory plan in essence dismisses service members who say they are gay, which is plainly a regulation of speech, not conduct. If, however, the presumption is rebuttable, then the plan may properly be deemed to be a regulation of conduct rather than of speech. It is therefore necessary to consider to what extent the presumption is a rebuttable one in order to decide whether the statute is a restriction on speech.

Although Thorne's attack focuses on the implementing regulations, it is useful at the outset to examine the statute, which provides, in pertinent part, that a service member shall be separated from service if there is a finding made that "the member has stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who . . . has a *propensity* to engage in . . . homosexual acts." 10 U.S.C. § 654(b)(2) (emphasis added).[4] Closely read, the statute is a tautology and hence the rebuttable presumption it purports to express is illusory, for it cannot be rebutted short of the declarant recanting the original statement declaring his or her homosexuality. This follows from the plain meaning of the statute's operative terms, namely "homosexual" and "propensity." "Propensity" is defined as a "[d]isposition or inclination to some action, course of action, habit, etc." *The Oxford English Dictionary*

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[4] The statute defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. § 654(f)(3).

637 (2d ed. 1989); *see also Webster's II: New Riverside University Dictionary* 943 (1984) ("An inherent inclination: TENDENCY"); *American Heritage College Dictionary* 1096 (3d ed. 1993) ("An innate inclination; tendency"). And in common parlance, a person who states he or she is gay or homosexual is declaring that he or she prefers persons of the same gender in sexual matter, that is that he or she has a sexual "inclination or propensity" for persons of the same gender. Indeed, "homosexual" is even defined in the authoritative OED as "[a] person who has a sexual propensity for his or her own sex." *The Oxford English Dictionary* 345 (2d ed. 1989). Given these definitions, the statute says, tautologically, nothing more than this: a service member who declares his or her homosexuality will be severed from the service unless the member convinces the fact finder that he or she is not a homosexual.[5] In other words, the presumption is irrebuttable absent a recantation.[6] So understood, the statute, on its face, is plainly aimed at

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[5] This tautology was recognized during the legislative debates preceding the statute's enactment. As Representative Roscoe G. Bartlett explained:

> [A service member] has to prove that he did not have a propensity. And I looked up propensity in the dictionary, and unless you have a different dictionary, if he doesn't have a propensity, he is not a homosexual. So if he says he is a homosexual, but now to clear himself he has to prove that he, in fact, lied to you about that, he is not homosexual; that is what propensity says.

Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings on H.A.S.C. No. 103-19 Before the Military Forces and Personnel Subcommittee of the House Committee on Armed Services, 103d Cong., 1st Sess. 200 (1993).

[6] The legislative history accompanying the passage of the "Don't Ask, Don't Tell" plan embodied in § 654 supports the conclusion that on the face of the statute only a recantation rebuts the presumption. For example, the Report of the Senate Committee on Armed Services states that:

The committee intends that this provision be interpreted in accordance with the following points . . .

Second, a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future; nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it.

Third, if the member in rebuttal offers evidence to the effect that he or she does not engage in homosexual acts or have a propensity or intent to do so that does not shift the burden to the Government. Because the burden remains on the service member throughout the proceeding, the member bears the burden of persuading the fact finder by a preponderance of the evidence that the rebuttal is more credible than the original statement (*e.g., by proving that the original statement was made in jest*).

S.Rep. No. 112, 103d Cong., 1st Sess. 294 (1993) (emphasis added).

And during the Senate hearings on the "Don't Ask, Don't Tell" statute, Jamie Gorelick, then general counsel for the Department of Defense, confirmed that a declarant who recanted might succeed in rebutting the presumption. She also noted that it was "hypothetically" possible for one to have a homosexual orientation with having a propensity to engage in homosexual acts, but she did not explain during those hearings how a service member could rebut the presumption short of retracting the original statement. When she was asked whether the statement "I am a homosexual but I have no intent or desire to engage in homosexual acts and I have never engaged in homosexual acts" would be enough to rebut the presumption, Ms. Gorelick answered:

It is hypothetically possible that . . . a decisionmaking authority could take that assertion to be sufficient. For example, if that assertion is essentially, I was misunderstood, I did not mean it, it was a joke. I mean it could hypothetically suffice.

In the real instance that I believe you are trying to get at, Senator, in which someone made the statement knowingly and was not drunk or had not lost his or her mind, it seems to me it is very very unlikely that the mere assertion that I am not engaged in acts, I do not have such a propensity or intent, would be sufficient to carry that burden . . . which . . . is a very high burden. . . .

Policy Concerning Homosexuality in the Armed Forces: Hearings before the Senate Committee on Armed Services, 103d Cong., 2d Sess. 772 (1993).

speech, not conduct, and is therefore equally plainly a restriction on speech.[7]

B. Conduct or Speech: The Regulation

Considered in isolation, then, the statute on its face imposes a restriction on speech. But this does not end the matter for the statute should not be read apart from the Department of Defense's implementing regulations, as Congress explicitly provided that the "Don't Ask, Don't Tell" plan embodied in § 654 was to be implemented "under regulations prescribed by the Secretary of Defense," 10 U.S.C. § 654(b), which are contained in Department of Defense Directive 1332.30. *See Chevron v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."). Thorne's facial attack on the plan, then, must encompass both the statute and the implementing Directives. When the statute is considered together with this Directive, the statutory tautology disappears because the Directive defines "propensity" differently from the dictionary definitions cited here. According to the Directive, a "[p]ropensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage

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[7] Under the "Don't Ask, Don't Tell" plan, then homosexual males and females are allowed to serve in the military provided they "don't tell", that is provided they do not state that they are gay. Under the previous plan, homosexuals could not serve; they were barred on the basis of their status, not their speech. Thus, the cases upholding the previous policy against First Amendment challenges are inapposite here. *See, e.g., Steffan v. Perry,* 41 F.3d 677 (D.C.Cir.1994); *Pruitt v. Cheney,* 963 F.2d 1160 (9th Cir.1991); *Ben-Shalom v. Marsh,* 881 F.2d 454 (7th Cir.1989), *cert. denied,* 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990).

in homosexual acts." Dir. 1332.30 at 1-1 (emphasis added). And the Directive goes on to define a "statement that a member is a homosexual or bisexual or words to that effect" as "[l]anguage or behavior that a reasonable person would believe was intended to convey that statement that a person engages in, attempts to engage in, or has a propensity to engage in homosexual acts." Dir. 1332.30 at 2-1. These regulatory definitions make clear that a service member triggers the presumption by making a statement that a reasonable person would believe was intended to convey the statement that the member had a propensity to engage in homosexual acts. Also clear from the Directive's definitions is that the member can then rebut that presumption, without recanting the original statement, by convincing the factfinder that although he has a homosexual orientation, he is not *likely* to engage in homosexual acts. Because the directive makes a meaningful distinction between an unrecanted statement of homosexual orientation, on the one hand, and a propensity to engage in homosexual acts, on the other, the possibility of rebutting the presumption is, on the face of the directive, no longer illusory. Theoretically, then, a service member could trigger the presumption by stating that he was gay, but then rebut the presumption by showing that he was not likely to engage in homosexual acts. Thus, the entire "Don't Ask, Don't Tell" plan, including the implementing Directive, appears on its face to provide service members with an opportunity to rebut the presumption without having to recant the triggering statement of homosexuality. From this, it follows that the plan is aimed at conduct and is not a speech restriction.

This conclusion does not end the inquiry, for Thorne contends that the manner in which the plan, including the Directive, operates in practice allows no rebuttal of the presumption short of recantation. More specifically, his contention is that although the Directive creates a theoreti-

cal possibility of rebutting the presumption without recanting the statement that triggered the presumption, the DOD has applied the Directive in a manner that makes the presumption irrebuttable in practice. Assessing this aspect of Thorne's challenge requires a factual inquiry into the manner in which § 654 and Directive 1332.20 have been implemented in practice.

Unfortunately, the current record is too sparse to permit a confident conclusion on this issue. For its part, the government offered the affidavit of Navy Commander Robert P. Monahan, who is the Assistant Division Director of the General Litigation Division in the Navy's Office of the Judge Advocate General. Monahan states that as of May 15, 1994, discharge proceedings had been instituted against eleven service members because they had stated they were homosexual or bisexual, and that five of the members had rebutted the presumption. But he does not go on to describe the facts of those cases, so it is impossible to know whether the members rebutted the presumption by recanting their original statements or in some other manner. At the hearing on this matter, counsel for the government admitted she was not familiar with the facts of the five cases, but thought that in one or two of the cases the member rebutted the presumption by testifying "that he was confused about his sexuality and had perhaps decided that he was not inclined or likely to engage in any homosexual conduct because he wasn't really sure what his preference was." Statements of this sort, of course, are essentially recantations.

Although government counsel was unsure about the facts of these cases, a newspaper report reflects that one service member who stated that she was a lesbian was retained even though she did not recant her statement. It appears she was found to have rebutted the presumption merely by testifying that she had not engaged in homosexual activity in the service in the past and would not do so in the future. *See*

Reynolds Holding, *Navy Quits Trying to Boot Lesbian Officer,* S.F. Chron., June 16, 1995, at A16. This result seems contrary to the intention of the drafters of the "Don't Ask, Don't Tell" plan as that intention is reflected in the committee hearings. *Policy Concerning Homosexuality in the Armed Forces: Hearings before the Senate Committee on Armed Services,* 103d Cong., 2d Sess. 772 (1993); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings on H.A.S.C. No. 103-19 Before the Military Forces and Personnel Subcommittee of the House Committee on Armed Services,* 103d Cong., 1st Sess. 200 (1993). Nonetheless, the case, if true, supports the notion that the presumption, as a matter of practice, can be rebutted. If the DOD in fact applies the plan in a manner consistent with the definitions in the Directives, then the plan would not implicate the First Amendment, for it would amount to a government regulation aimed at a service member's conduct. The service member's speech would merely service as the trigger for the process. *See Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (court upheld against First Amendment challenge a government policy whereby person's statement of intent not to register with the Selective Service System triggered an investigation and possible prosecution).

Yet, whether the DOD in fact administers the plan in a manner that allows the presumption to be rebutted short of a recantation is in doubt in light of a memorandum issued by Judith Miller, general counsel for the DOD, after the decision to retain the lesbian Navy officer. *See* Rowan Scarborough, *Pentagon Memo Removes Winning Defense for Gays,* Wash. Times, December 29, 1995, at A3. In that memorandum, Ms. Miller indicated that a service member's argument that her statement of homosexuality was merely a statement of orientation and not of conduct should not be interpreted by administrative boards as a successful defense.

If this memorandum accurately reflects the current DOD enforcement policy, then it may well be that nothing short of a recantation of the original statement would cause an administrative board to find that the presumption had been rebutted. In that case, the "Don't Ask, Don't Tell" plan would amount to the rule that if a service member says he is gay, he will be discharged, unless he convinces the board that he is not gay. Because a service member's retention in the services would turn on whether or not he *states* that he is gay, the plan would amount to a restriction on that member's speech, rather than a regulation of his conduct.

In sum, the current record precludes a confident conclusion concerning whether the "Don't Ask, Don't Tell" plan, as enforced, affords openly gay service members with a meaningful opportunity for rebuttal of a presumption created by speech. Accordingly, by order entered contemporaneously with this Memorandum Opinion, the Court directs the parties to supplement the record with facts to enable the Court to determine the extent to which the presumption is rebuttable in practice without a recantation.

In any event, it is useful at this point to consider whether the constitutionality of the "Don't Ask, Don't Tell" plan actually turns on the manner in which the plan is applied. The government contends that it does not, because even if the plan amounts to a restriction on speech rather than on conduct, it passes First Amendment muster. Assuming *arguendo,* that the plan amounts to a speech restriction, the analysis of the plan's constitutionality proceeds in three steps. First, it must be determined whether the restriction is content-based or content-neutral, as this controls the appropriate level of judicial scrutiny. Next, because this is a novel context, the appropriate level of scrutiny must be identified. Finally, the plan must be examined using the appropriate level of scrutiny to ascertain whether it passes muster.

C. Content-Based or Content-Neutral

Assuming, *arguendo,* that the "Don't Ask, Don't Tell" plan is a speech restriction, the next question is whether the regulation is content-based or content-neutral. The question is significant because if the restriction is content-neutral, it will be subjected to a significantly lower degree of judicial scrutiny than if it is a content-based restriction.

In general, "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based." *Turner Broadcasting System, Inc. v. F.C.C.,* 512 U.S. 622, ___, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994). The "Don't Ask, Don't Tell" plan is plainly a content-based restriction because it identifies the speech that triggers the presumption on the basis of the content of that speech. Service members who say, "I am a heterosexual" or who say nothing at all are not subject to dismissal, but those who say "I am a homosexual" are subject to dismissal. *See, e.g., Boos v. Barry,* 485 U.S. 312, 318-19, 108 S.Ct. 1157, 1162-63, 99 L.Ed.2d 333 (1988) (plurality opinion) (holding municipal ordinance that determines whether picketing in front of foreign embassies is permitted on the basis of whether the picket signs are critical of the foreign government to be content based).

The govenment, citing *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), contends that the plan is nonetheless a content-neutral restriction because it is aimed not at the speech itself, but at the "secondary effects" of the speech. In *Renton,* a city ordinance prohibited adult movie theatres from locating within 1000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Although the ordinance placed no restrictions on the location of theatres showing other types of movies, the Supreme Court held that the restriction was properly analyzed as a content-neutral

time, place, and manner regulation because it was aimed not at the content of the films shown "but rather at the *secondary effects* of such theaters on the surrounding community." *Id.* at 47, 106 S.Ct. at 928. The ordinance was purportedly designed to "prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of life" in the city, and was therefore "*justified* without reference to the content of the regulated speech." *Id.* at 48, 106 S.Ct. at 929 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) (emphasis added)). Similarly, argues the government here, the "Don't Ask, Don't Tell" plan is justified on the basis of the disruptive effect associated with a service member's statement that he is a homosexual, such as impairment of unit cohesion and military preparedness. This argument is unpersuasive; it stretches the "secondary effects doctrine" too far. The Supreme Court has made clear that "'[l]isteners' reactions to speech are not the type of 'secondary effects' . . . referred to in *Renton*. . . . The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos,* 485 U.S. at 321, 108 S.Ct. at 1164 (refusing to apply *Renton* to ordinance making it unlawful to carry outside a foreign embassy a picket sign displaying a message critical of that foreign government); *see also R.A.V. v. City of St. Paul,* 505 U.S. 377, 394, 112 S.Ct. 2538, 2549, 120 L.Ed.2d 305 (1992) (refusing to apply *Renton* to statute that prohibited the display of a symbol which one knows to arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender). Similarly, the government here cannot defend the "Don't Ask, Don't Tell" statutory plan by asserting that it is aimed not at the statement "I am gay," but at the psychological impact that statement has on those who hear it. *See Boos,* 485 U.S. at 321, 108 S.Ct. at 1164 ("[I]f the ordinance [in *Renton*] was

justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate.").

D. Appropriate Level of First Amendment Scrutiny

The next step in the analysis is to identify what level of judicial scrutiny the statute and regulation must survive in order to pass constitutional muster. Ordinarily, content-based speech restrictions are subject to "strict scrutiny," surviving only if the government "show[s] that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board,* 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991) (quoting *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221, 231, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209 (1987)). Such restrictions are subjected to this most exacting scrutiny because they "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster,* 502 U.S. at 116, 112 S.Ct. at 508. And this is of constitutional significance because "[t]he First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Boos v. Barry,* 485 U.S. 312, 318, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (quoting *New York Times v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964) (citations omitted)). But this rationale does not apply with equal force in the military context, for the "military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman,* 475 U.S. at 507, 106 S.Ct. at

1313. Thus, it is well settled that judicial review "of military regulations challenged on First Amendment ground is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986).[8]

While it is clear that the traditional strict scrutiny standard is inappropriate in this context, it is unclear exactly what standard should apply. No case has explicitly defined the appropriate level of scrutiny to be applied to a content-based restriction on speech in the military context. The parties commend to the Court standards divined from the Supreme Court's holdings in *Goldman v. Weinberger,* 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed.2d 478 (1986) and *Brown v. Glines,* 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed.2d 540 (1980). Those cases are inapposite, however, because each involved military regulations that were content-neutral.[9] Nor

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[8] It is worth making clear that the deference in the particular circumstances of this case is to the judgment of the DOD concerning military matters, including what factors affect military readiness and effectiveness. Yet, in the case of the "Don't Ask, Don't Tell" plan, it may be plausibly argued that the plan was not solely the product of DOD's military judgment, which surely warrants deference, but is instead the product of a political compromise made with one eye on DOD's military judgment and the other on the next election, a circumstance arguably entitled to less, if any, judicial deference. But this notion, while plausible, is too speculative to serve as a basis for a judgment about the proper degree of judicial deference and has played no role in this decision.

[9] In *Glines,* the Supreme Court upheld on a First Amendment challenge Air Force regulations requiring service members to obtain prior approval from the base commander before circulating petitions on base. The Supreme Court held that the regulation passed constitutional muster because it "restricted[ed] speech no more than [was] reasonably necessary to protect the substantial governmental interest." 444 U.S. at 355,

does it appear appropriate to adopt the First Amendment "intermediate scrutiny" test, which applies to time, place, and manner restrictions, a category of restrictions into which the "Don't Ask, Don't Tell" plan does not fall.[10] And it also seems inappropriate to attempt to apply some level in between, for unlike the traditional three levels of scrutiny in the equal protection context, the tests of strict scrutiny and intermediate scrutiny in the First Amendment context do not represent points along a continuum of judicial review. Rather, the two standards are more different in quality than in degree, reflecting the fact that they apply to two different types of speech restrictions. The strict scrutiny test is applied to restrictions in which the government discriminates on the basis of the content of speech, whereas the intermediate scrutiny test if applied to content-neutral time, place, and manner restrictions. In other words, the intermediate scrutiny standard, unlike its equal protection counterpart, does not represent a more deferential version of the strict scrutiny

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100 S.Ct. at 599. In *Goldman*, the Court considered the constitutionality of an Air Force regulation restricting the wearing of non-military headgear. The regulation was challenged by an officer who wished to wear a yarmulke, non-military headgear prohibited by the regulation. The Supreme Court upheld the regulation, stating that the restriction "reasonably and evenhandedly regulate[d] dress in the interest of the military's perceived need for uniformity." 475 U.S. at 510, 106 S.Ct. at 1314.

[10] Under this standard, time, place, and manner restrictions on speech survive First Amendment scrutiny provided they "are justified without reference to the content of speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

standard, but is instead a standard fashioned to fit the task of reviewing restrictions different in nature from the restrictions the plan embodies. By contrast, the strict scrutiny standard is fit for reviewing the category of restriction into which the plan falls, but it is not tailored to do so because it takes no account of the plan's military context and the judicial deference this entails. From this, it follows, sensibly, if not inevitably, that the appropriate level of scrutiny should be a moderated version of strict scrutiny.

Strict scrutiny requires a reviewing court to inquire into whether the speech restriction is "necessary to serve a compelling state interest." *Simon & Schuster,* 502 U.S. at 118, 112 S.Ct. at 509. Moderating that standard somewhat to allow for deference to the military would indicate that instead of being "necessary" to the achievement of government objectives the "Don't Ask, Don't Tell" plan need only "substantially further" those goals. And rather than the governmental interest being "compelling," they need only be "important." This yields the result that a content-based regulation in the military context must substantially further an important governmental interest in order to pass First Amendment muster. Notably, this standard is quite similar to the intermediate scrutiny standard in the equal protection context. *See e.g., Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 1914 ("substantially related to an important governmental objective"); *Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (same). Such a resemblance is to be expected, for in the equal protection context, the intermediate scrutiny standard was intended to be a standard of review similar in quality, but more deferential in degree than the traditional strict scrutiny standard applicable to suspect classifications.

E. Application of Heightened Scrutiny

It remains to determine whether the "Don't Ask, Don't Tell" plan survives this moderated heightened scrutiny. The proffered governmental interest for the plan is to maintain military readiness by preserving "unit cohesion." Specifically, the government identifies three aspects of that goal: (i) preserving privacy among service members, (ii) minimizing sexual tension, and (iii) preventing unit polarization. There can be little dispute that these interests are "important," and Thorne concedes as much. The more difficult question is whether the "Don't Ask, Don't Tell" plan "substantially furthers" those interests. For this task, it is necessary to examine the plan in the light of each of the three specific interests identified by the government.

First, does the "Don't Ask, Don't Tell" plan substantially further the goal of protecting the privacy of service members? The government's position is that it invades the privacy of service members to require them to live, sleep, and shower with those who may find them sexually attractive. While this may be true, the particular statute that Congress chose to enact nonetheless does not substantially further the goal of privacy, for it does not in fact protect the privacy of heterosexuals by keeping "their naked bodies safe in the showers from the stares of homosexuals." *Able v. United States*, 880 F.Supp. 968, 978 (E.D.N.Y.1995). Gays are allowed to serve.[11] Gays are allowed to shower with

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[11] History confirms that homosexuals have served as ably, as effectively, and with the same measure of devotion to duty and heroism as have heterosexuals and hence that a person's merit as a soldier, sailor, airman, or marine is independent of the person's sexual orientation. In any event, no opinion is expressed here on whether a person's sexual preference or orientation, by itself and in the absence of proscribed conduct, could constitutionally serve as a basis for exclusion or separation from the military.

heterosexuals. A heterosexual *knows* that homosexuals are serving—and showering—in the military. Indeed, heterosexuals do not even have the dubious benefit of being oblivious as to whether their shower mates are homosexual, because the Directive explicitly states that the "rebuttable" presumption is not triggered by "associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes." DOD Directive 1332.30 at 8-1; *see also* S.Rep. No. 112, 103d Cong., 1st Sess. 292 (1993). Thus, for example, a heterosexual service member may be required to share bath facilities with a member of the same gender who has been seen marching in a gay rights parade in civilian attire.

The government does not adequately answer this point, relying instead on the congressional testimony of distinguished witnesses to the effect that privacy is threatened by homosexuals serving in the military. But these statements, while they might support an outright ban on gays in the military, do not explain how the privacy of heterosexual soldiers is promoted by a statutory and regulatory plan that simply requires a gay soldier to refrain from speaking the words "I am gay." For example, General Colin Powell was quoted in a Senate Report as stating:

> [I]t is very difficult in the military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of individuals who are proud, brave, loyal good Americans, but who favor a homosexual lifestyle, and put them in with heterosexuals who would prefer not to have someone of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, the latrines, and showers.

S.Rep. No. 112, 103d Cong., 1st Sess. 283 (1993). Accordingly, the Senate Committee concluded that in "civilian life people are not compelled to live with individuals who are sexually attracted to persons of the same sex, and the committee finds no military necessity to compel persons to do so in the military." *Id.* at 281. This, of course, is exactly what the current statute and regulations *do* compel. A plan that *allows* gays to serve in the military—as this one does—contemplates that gays in fact *will* serve. These comments, and others like them in the legislative history, simply do not explain how or in what way the privacy interests of service members are furthered by the practice of discharging vocal homosexuals while allowing known, yet silent homosexuals to serve.

Second, does the "Don't Ask, Don't Tell" plan substantially further the goal of minimizing sexual tension? The government contends that sexual tension is destructive in the military context because it is distracting. No one can plausibly disagree with this proposition. Indeed, it is for this reason, in part, that the military provides separate barracks for men and women. The government points to testimony that:

> With openly gay and heterosexual personnel together, sexual tension would fester 24 hours a day in deployed military units and ships. Romantic interests, even if unconsummated, would shatter the bonds that add up to unit cohesion.

Bernard E. Trainor & Eric L. Chase, *Keep Gays Out*, N.Y. Times, March 29, 1993, at A15, *quoted in, Policy Concerning Homosexuality in the Armed Forces: Hearings before the Senate Committee on Armed Services*, 103d Cong., 2d Sess., 307 (1993) (statement of Sen. Warner). But even granting that sexual tension is destructive of unit cohesiveness, it is hard to see how the "Don't Ask, Don't

Tell'' plan furthers minimizing sexual tension in the military. The government has not explained how the exclusion of a service member who says ''I am gay'' while tolerating silent homosexuals serves to reduce or minimize sexual tension in the ranks. Indeed, it may plausibly be argued, that the opposite is true. By the government's own logic, the silent gay will experience some degree of sexual tension, unconsummated though it might be. Indeed, when one considers that soldiers are permitted to march in gays rights parades and engage in other activity that indicates a likelihood that one is gay without triggering the presumption, it is difficult to see how sexual tension is reduced by banning speech that amounts to the three words ''I am gay.''

Finally, does the ''Don't Ask, Don't Tell'' plan substantially further the goal of preventing unit polarization? The government argues that when an openly gay soldier is allowed to serve, that soldier's unit polarizes, with those who oppose gays serving in the military on one side, and those who support their service on the other. Such polarization, argues the government, threatens military effectiveness. No doubt polarization of any sort[12] hampers a unit's cohesive-

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[12] Worth noting is that polarization deleterious to a unit's effectiveness could also arise as a result of disagreement among service members over a wide range of issues, including politics, race, ethnicity, and religion. One wonders in this regard whether this polarization contention would be persuasive in support of a ''Don't Ask, Don't Tell'' plan for Jews or for Muslims. Sexual tension and religious tension are different in nature, but no fair observer of human history could conclude that religious fervor and religious antipathies are less deeply felt and less potentially incendiary than sexual ones. Even so, a ''Don't Ask, Don't Tell'' plan for religious affiliations would never be proposed or tolerated and it would be instructive to understand why this is so. Perhaps an important reason is the quality of leadership in our society's many institutions. If the leaders of those institutions understood prejudice against homosex-

ness and hence its military effectiveness. Yet, once again, the "Don't Ask, Don't Tell" plan fails substantially to further the goal of preventing such polarization. The Directive explicitly allows the service of a homosexual who does not disclose his sexual orientation, but who nonetheless reads gay literature, frequents gay bars, and marches in gay rights parades. It also allows the service of one who refuses to reveal his or her sexual orientation, but who nonetheless vociferously advocates for the right of gays to serve. Both of these persons would cause substantially the same degree of debate, unrest, and polarization as that caused by a person who actually stated he was gay. Discharging only those who make the statement, "I am gay" does not substantially further the prevention of unit polarization.

In sum, requiring that service members "Don't tell," while still permitting homosexuals to serve does not substantially further any of the proffered goals of the "Don't Ask, Don't Tell" plan. Accordingly, if the record, as supplemented by the parties, were to reflect that the "Don't Ask, Don't Tell" plan is implemented in practice in such a way as to make the presumption irrebuttable, then § 654(b)(2) and its accompanying regulations would constitute a content-based restriction on speech that fails heightened scrutiny and therefore violates the First Amendment.

An appropriate order will issue.

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uals as a fiction born of ideology, then that view would eventually permeate society and eliminate any potential polarization stemming from the service of openly gay people in the military, just as leadership has helped, and continues to help, to ensure that attitudes among service members about religion and race tend to tolerance, not intolerance and hence to cooperative effort, not polarization.

APPENDIX D

[373] **PROCEEDINGS**

CAPTAIN COOK: The board is back in session.

Before proceedings with the findings and recommendation, I'd like to take the opportunity to thank Lieutenant Thorne and his defense and support group for the professional demeanor in which these proceedings were conducted. You helped to facilitate a difficult situation and the board appreciates that. And to the Government, and to the friends in the press that have maintained a very professional demeanor. I thank you.

Findings. The cumulative statements of Lieutenant Thorne that he is a homosexual raise the presumption of homosexual conduct as set forth in DoD Directive 1332.30 dated 21 December, 1993 and the Navy implementation guidance, NAVADMIN 033/94. The statements of Lieutenant Thorne and facts presented in the Government's evidence clearly creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so.

Evidence and testimony presented by counsel for the Respondent failed, in fact made no effort, to rebut the presumption.

Recommendations. By a vote of three to zero, the board recommends Lieutenant J.G. Thorne has failed to show cause for retention in the naval service and he should be [374] separated with an honorable discharge.

These proceedings are adjourned.

[Whereupon, at 11:33 a.m., the proceedings were adjourned.]

APPENDIX E

DEPARTMENT OF THE NAVY
[seal] BUREAU OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

IN REPLY REFER TO
1920
Pers-911
9 mar 95

From: Chief of Naval Personnel
To: LT Tracy W. Thorne, USNR-R, 266-63-2645/1325
Via: Commanding Officer, Naval Reserve Personnel Center (Code 413)

Subj: SEPARATION ORDER

Ref: (a) Title 10, U.S. code, Section 1162 and 1163
(b) SECNAVINST 1920.6A
(c) ASM(MERA) memo of 6 Mar 95
(d) CHNAVPERS ltr 1920 Ser 822/2578 of 17 Nov 94

1. Pursuant to references (a) and (b), the Secretary of the Navy, acting for the President, discharged you from the United States Naval Reserve effective 6 March 1995 with an Honorable discharge, per reference (c).

2. This action was due to the recommendation of a Board of Inquiry. Per reference (d), your separation code is GRB (homosexual admission), which will be used by the Naval Reserve Activity for the RSTARS diary entry.

3. The via addressee is directed to forward this letter (separation orders) using return receipt mail. The service record holder is directed to close out LT Thorne's record with a copy of the separation orders enclosed, and to ensure the final separation processing is completed as soon as

possible. The Honorable Discharge certificate will be forthcoming.

/s/ D. A. Lewelling
D. A. LEWELLING
By direction

Copy to:
BUPERS (FERS 93, 822)
COMNAVRESFOR (N002)
NAVRESPERSCEN (Code 25)
COMNAVRESCRICTCOM (Code 005)
LT Thorne (Advance copy)

APPENDIX F

THE CONSTITUTION OF THE UNITED STATES

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX G

§ 654. Policy concerning homosexuality in the armed forces.

(a) Findings.—Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) The extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) Policy.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) Entry standards and documents.—(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) Required briefings.—The briefings that members of the armed forces receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) Rule of construction.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) Definitions.—In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(Added Pub.L. 103-160, Div. A, Title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.)

APPENDIX H

Department of Defense

[seal] DIRECTIVE

NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

References: (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," October 15, 1981 (hereby canceled)
(b) Title 10, United States Code, Chapter 60 and Sections 618, 630, 654, 827, 831
(c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
(d) DoD 5200.2-R, "DoD Personnel Security Program, "December 1979, authorized by DoD Directive 5200.2, "DoD Personnel Security Program," December 20, 1979
(e) Title 10, United States Code, Sections 801-940 (Uniform Code of Military Justice)

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)

2. Implements Chapter 60 and Section 630 of reference (b) to establish policies, standards, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.

3. Implements Chapter 60 and Section 630 of reference (b) with respect to discharge of regular commissioned officers with less than five years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE.

1. This Directive applies to the Office of the Secretary of Defense (OSD) and to the Military Departments and covers regular commissioned officers of the Military services. The term "Military Service," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

2. This Directive does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

It is the policy of the Department of Defense:

1. To promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

2. To judge the suitability of persons to serve in the Armed Forces on the basis of their conduct.

3. To separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

a. Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

b. Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

4. Notwithstanding any other provision of this directive, the Secretary of the Military Departments concerned may discharge regular commissioned officers with less than five years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. The provisions of Enclosure 6 apply to the discharge of probationary officers under this authority.

5. The Assistant Secretary of Defense for Personnel and Readiness, in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. STANDARDS AND PROCEDURES

Standards and procedures for implementation of these policies are set forth in enclosures 2 through 8.

F. RESPONSIBILITIES

1. The *Assistant Secretary of Defense* for *Personnel and Readiness* shall modify or supplement this Directive, as needed.

2. The *Secretaries of the Military Departments* shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

b. Address any recommendations for policy changes in this Directive to the ASD (P&R).

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 5, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 5, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the ASD (P&R) within 30 days.

Enclosures — 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquires into Homosexual Conduct

[ENCLOSURE 1]

[1-1]

DEFINITIONS

1. *Active Commissioned Service.* Service on active duty as a commissioned officer in a grade above warrant officer, W-4.

2. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. *Commissioned Officer.* An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer of retired commissioned officer.

4. *Convening Authority.* The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.

5. *Counsel.* A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.

6. *Drug Abuse.* As defined in DoD Directive 1010.4 (reference (c)).

7. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

8. *Homosexual Act.*

a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and

b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (a).

9. *Homosexual Conduct.* A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

10. *Legal Advisor.* A judge advocate qualified under 10 U.S.C. 827(b)(1), (reference (b)), and appointed to assist a Board of Inquiry.

11. *Nonprobationary Commissioned Officer.* A commissioned officer other that a probationary commissioned officer.

[1-2]

12. *Probationary Commissioned Officer.* A Commissioned officer with less that 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his appointment as a regular commissioned officer.

13. *Propensity.* Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

14. *Respondent.* A commissioned officer required to show cause for retention on active duty.

15. *Separation.* Discharge, retirement or resignation.

16. *Sexual Orientation.* A sexual attraction to individuals of a particular sex.

17. *Show-Cause Authority.* Any of the following as determined by the Secretary of the Military Department concerned.

a. Commanders exercising General Court Martial (GCM) authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary or officers (not below the grade of major general of rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case for retention on active duty.

[ENCLOSURE 2]

[2-1]

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.

2. Efficiency.

3. Leadership.

4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.

5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from the Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.

2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.

3. Drug abuse.

4. Intentional neglect of, or failure to perform, assigned duties or complete required training.

5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.

6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage

[2-2]

in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and,

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so.

Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) whether the officer as engaged in homosexual acts;

(2) the officer's credibility;

(3) testimony from others about the officer's past conduct, character, and credibility;

[2-3]

(4) the nature and circumstances of the officer's statement;

(5) any other evidence relevant to whether the officer is likely to engage in homosexual acts.

This list is not exhaustive; any other relevant evidence may also be considered.

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b., except in cases where the officer's conduct was solely the result of a desire to avoid or terminate Military Service.

3. Nothing in these regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons set forth in sections A., B., C., and D. above; however, separate findings under each applicable section shall be required as to the reasons for separation.

[ENCLOSURE 3]

[3-1]

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. *Composition.* See enclosure 4.

2. *Convening.* A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. *Function.* A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

[3-2]

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. *Determinations*

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. *Composition.* See enclosure 4.

2. *Convening.* A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. *Function.* After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. *Determinations*

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secre-

tary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

[3-3]

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.

2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. *Retirement*. A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. *Discharge*. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.

2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

[3-4]

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

[ENCLOSURE 4]

[4-1]

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

[ENCLOSURE 5]

[5-1]

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. [sic] The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

[ENCLOSURE 6]

[6-1]

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.

2. That he or she may tender a resignation.

3. That he or she may submit a rebuttal or declination statement instead of a resignation.

4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers

or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.

2. Discharge.

The action of the Secretary is final.

[ENCLOSURE 7]

[7-1]

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY.

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. *Consideration.* The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. *Exceptions*

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for

separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

(1) By using force, coercion, or intimidation.

(2) With a person under 16 years of age.

(3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.

(4) Openly in public view.

(5) For compensation.

(6) Aboard a military vessel or aircraft.

(7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

[ENCLOSURE 8]

[8-1]

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

5. The guidelines in this enclosure do not apply to activities of Defense Criminal Investigative Organizations and other DoD law enforcement organizations, which are governed by DoD Instruction 5505.8 (reference (f)).

B. DEFINITIONS

1. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. *Commander.* A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. *Homosexual Conduct.* "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

[8-2]

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

5. *Sexual Orientation.* An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

C. BASES FOR CONDUCTING INQUIRIES

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

2. A basis for discharge exists if:

a. The member has engaged in a homosexual act.

b. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

c. The member has married or attempted to marry a person of the same sex.

3. Credible information does not exist, for example, when:

a. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or

b. The only information is the opinions of others that a member is homosexual; or

c. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

d. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when:

a. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

b. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

c. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[8-3]

E. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

E. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.

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No. 98-91

In the Supreme Court of the United States

OCTOBER TERM, 1997

TRACY THORNE, PETITIONER

v.

DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Act of Congress governing homosexual conduct in the military, 10 U.S.C. 654, requires separation of a member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is:

Whether 10 U.S.C. 654 and petitioner's discharge under it are consistent with the First Amendment and equal protection.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 139 F.3d 893 (Table). The opinions of the district court (Pet. App. 16a-43a, 3a-15a) are reported at 916 F. Supp. 1358 and 945 F. Supp. 924.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1998. The petition for a writ of certiorari was filed on July 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In enacting 10 U.S.C. 654 (Pet. App. 48a-52a), which governs homosexual conduct in the military, Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[1]

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[1] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30, applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel.[2] To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C.1.b. Cf. Pet. App. 61a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30, Encl. 1, Definitions ¶ 13; Pet. App. 58a (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. 1332.30, Encl. 1, Definitions ¶ 16; cf. Pet. App. 58a)—"is considered a personal and private matter, and is not a

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[2] The text of Directive 1332.30 set forth at Pet. App. 53a-83a differs in some immaterial respects from the Directive pursuant to which petitioner was discharged. Admin. R. 366-388.

bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C; cf. Pet. App. 60a.[3] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." *Ibid.* The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30, Encl. 2, Reasons for Separation ¶ C.1.b; Pet. App. 61a-62a.

3. Petitioner, then a Navy lieutenant, stated that he is a homosexual in a letter to his commanding officer and on a national television program. Pet. App. 18a. The Navy first instituted a discharge proceeding against petitioner based upon those statements under its former regulatory policy regarding military service by homosexuals. *Id.* at 18a-19a. After the enactment of 10 U.S.C. 654, petitioner was reprocessed under the current policy. Pet. App. 21a.

Following the hearing, a Naval board of inquiry recommended that petitioner be honorably discharged. Pet. App. 22a. The board found that petitioner had stated that he is a homosexual and that he had failed, "in fact made no effort, to rebut" the presumption arising from those statements that he "engages in homosexual acts or has a propensity or intent to do so." *Id.* at 44a. The board's recommendation was accepted

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[3] "Homosexual conduct" is defined by the directive as "[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30, Definitions ¶ 9; Pet. App. 57a.

by the Secretary of the Navy, and petitioner was honorably discharged. *Id.* at 22a, 45a-46a.

4. Petitioner then brought this suit claiming that his discharge was unconstitutional. The district court initially directed further development of the record "to enable the Court to determine the extent to which the presumption [in the policy] is rebuttable in practice without a recantation" by the service member of his original statement that he is a homosexual. Pet. App. 32a. Shortly thereafter, the Fourth Circuit sustained the statutory policy in *Thomasson* v. *Perry*, 80 F.3d 915 (en banc), cert. denied, 117 S. Ct. 358 (1996). The district court then granted summary judgment against petitioner. Pet. App. 3a-15a. The court noted that *Thomasson* held that the statutory presumption was indeed rebuttable in practice. *Id.* at 7a. The court also reviewed the administrative records of eight service members who had stated that they were homosexuals but had been retained in military service after they successfully rebutted the presumption that they engaged in prohibited homosexual acts or had a propensity to do so. *Id.* at 9a-14a. The court held that petitioner's facial First Amendment challenge could not succeed because "at least one [of the eight] service member[s] rebutted the presumption without disavowing his statement of homosexuality." *Id.* at 14a. The court also held that petitioner's as-applied challenge failed "because [petitioner] made no attempt to rebut the presumption in the administrative proceeding." *Id.* at 15a. On petitioner's appeal, the Fourth Circuit affirmed in an unpublished per curiam opinion, citing its decision in *Thomasson*. *Id.* at 1a-2a.

ARGUMENT

The decision below is correct and in accord with the decisions of all four courts of appeals that have considered the validity of the Act of Congress governing homosexual conduct in the military. See *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.) (en banc), cert. denied, 117 S. Ct. 358 (1996); *Selland* v. *Perry*, 905 F. Supp. 260 (D. Md. 1995), aff'd, 100 F.3d 950 (4th Cir. 1996) (Table), cert. denied, 117 S. Ct. 1691 (1997); *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996)(sustaining statute against First Amendment challenge, provided statute's prohibition of homosexual acts is upheld on remand);[4] *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 118 S. Ct. 45 (1997); *Philips* v. *Perry*, 106 F.3d 1420 (9th Cir. 1997) (sustaining statute's prohibition of homosexual acts); *Holmes* v. *California Army Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), petition for cert. pending (provisionally filed July 2, 1998). This Court recently denied certiorari in three of those cases, all of which presented First Amendment and equal protection issues similar to those presented in this case. There has been no change in circumstances that would warrant a different result here. Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Act of Congress governing homosexual conduct in the military is consistent with the First Amendment. The Act treats a service member's statement that he is a homosexual as a basis from which to presume, in the absence of

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[4] On remand from the *Able* decision, the district court held that the statute's prohibition of homosexual acts violates the First Amendment and equal protection. The government's appeal from that decision is now pending. *Able* v. *United States*, No. 97-6205 (2d Cir. argued Apr. 2, 1998).

rebuttal by him, that he is a "homosexual" as defined by the Act, *i.e.*, one "who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. 654(f)(1). The First Amendment does not prohibit such evidentiary use of a service member's statement. *Thomasson* v. *Perry*, 80 F.3d at 931-934; *Able* v. *United States*, 88 F.3d at 1292-1300; *Philips* v. *Perry*, 106 F.3d at 1429-1430; *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1136. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioner was afforded the opportunity to rebut the presumption in his administrative hearing, but he made no effort to do so. Pet. App. 15a, 44a. In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the Act of Congress at issue (see 10 U.S.C. 654(a)) show that that test is met here.[5]

2. The court below also correctly rejected petitioner's argument (Pet. 19-28) that 10 U.S.C. 654 and its implementing directive violate equal protection. The

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[5] Petitioner errs in arguing that the policy "crushe[s] the ability of gays and lesbians to urge the public to support an end to the ban." Pet. 11. The statute applies only to statements by a service member "that he or she is a homosexual or bisexual, or words to that effect" (10 U.S.C. 654(b)(2)), not to statements opposing the policy. See DoD Directive 1332.30, Encl. 8, Guidelines for Fact-Finding Inquiries into Homosexual Conduct ¶ C.3.d (Pet. App. 80a-81a) ("marching in a gay rights rally in civilian clothes" is not credible evidence of a basis for discharge). No action was taken against petitioner for any statement he may have made of his viewpoint opposing the policy. Petitioner therefore errs in attempting to distinguish *Thomasson* and the other precedents upholding this statute on the ground that they "did not involve an officer speaking out as part of a political debate." Pet. 21-22 n.6.

court of appeals relied upon its decision in *Thomasson*, which held that the statutory policy classifies on the basis of homosexual acts and the propensity to engage in such acts, not on the basis of sexual orientation or status. 80 F.3d at 928. *Thomasson* also held that this acts-based classification in a military context is not suspect and does not burden any fundamental right, so that it is therefore reviewable under the rational-basis test. *Ibid.* That holding is correct and in accord with the decisions of the other courts of appeals that have addressed this issue. *Richenberg* v. *Perry*, 97 F.3d at 260; *Philips* v. *Perry*, 106 F.3d at 1425; *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1132.

Thomasson then held that, given the special circumstances of military service, the armed forces can validly exclude those who engage in homosexual acts. 80 F.3d at 928-929.[6] Further, *Thomasson* properly sustained the judgment of the Legislative and Executive Branches, as well as military leaders, that service members with a propensity or intent to engage in homosexual acts should also be excluded as a means of fostering the legitimate aims of maintaining unit cohe-

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[6] Petitioner argues that the policy is invalid because it "proscribes conduct by homosexual servicemembers that is not similarly proscribed for heterosexual servicemembers such as hand-holding and kissing." Pet. 25. He did not, however, raise that argument in the court below, so it is not properly before this Court. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989). In any event, petitioner was not discharged for hand-holding or kissing another man, and he did not attempt to show that, when he stated that he is a homosexual, he meant that he has engaged, and is likely to engage, in only homosexual acts of that kind. Petitioner thus lacks standing to argue that others might be discharged for noncriminal homosexual acts. See *Parker* v. *Levy*, 417 U.S. 733, 757-761 (1974) (declining to apply overbreadth doctrine in the military context).

sion, protecting privacy interests, and minimizing sexual tensions. *Id.* at 929-931. Given those rational and legitimate aims, *Thomasson* correctly rejected (*id.* at 927-931) the same argument that petitioner makes here—namely, that the statute is impermissibly "based on invidious or irrational prejudice." Pet. 23. The Eighth and Ninth Circuits have also rejected that argument. *Richenberg* v. *Perry*, 97 F.3d at 261; *Philips* v. *Perry*, 106 F.3d at 1429. See *Holmes* v. *California Army Nat. Guard*, 124 F.3d at 1133-1136.

Petitioner's reliance (Pet. 24) on *Romer* v. *Evans*, 517 U.S. 620 (1996), is misplaced because there are at least four important distinctions between Amendment 2 to the Colorado Constitution at issue in *Romer* and the statute challenged here. First, 10 U.S.C. 654, which concerns military service by persons who engage in homosexual conduct, is much narrower in scope than Colorado's Amendment 2, which this Court described as a "sweeping" and "unprecedented" measure that withdrew from homosexuals the "protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," so much so as to "deem a class of persons a stranger to its laws." 517 U.S. at 627, 631, 633, 635. Second, *Romer* arose in the civilian context and does not affect precedents, such as *Parker* v. *Levy*, 417 U.S. 733, 756 (1974), holding that "Congress is permitted to legislate both with greater breadth and with greater flexibility" in the military context. See *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (sustaining men-only draft law). Third, Colorado's Amendment 2 classified on the basis of homosexual status (517 U.S. at 635), while the statute at issue here classifies on the basis of past or likely future prohibited homosexual acts. Fourth and most important, the statute chal-

lenged here serves the legitimate objectives of prohibiting homosexual acts in the military, promoting unit cohesion, protecting privacy interests, and reducing sexual tensions, while this Court found that Amendment 2 had no legitimate objective. 517 U.S. at 635.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998